TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 340.

THOMAS BRAM, OTHERWISE CALLED THOMAS C. BRAM, OTHERWISE CALLED THOMAS M. BRAM, OTHERWISE CALLED A. THOMAS BRAM, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED MARCH 27, 1897.

(16841.)

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1 *Writ of error.*

UNITED STATES OF AMERICA, ss.

The President of the United States to the honorable the judges of the circuit court of the United States for the district of Massachusetts, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, in a cause entitled United States by indictment against Thomas Bram, otherwise called Thomas C. Bram, otherwise called Thomas M. Bram, otherwise called A. Thomas Bram, a manifest error hath happened, to the great damage of the said Thomas Bram, so otherwise called as aforesaid, as by his complaint appears: We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States at Washington, together with this writ, so that you have the same at the city of Washington on the sixth day of April next, in the said Supreme Court, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the ninth day of March, in the year of our Lord one thousand eight hundred and ninety-seven.

ALEX. H. TROWBRIDGE,
Clerk of the Circuit Court of the United States, District of Massachusetts.

Allowed by—

LE BARON B. COLT,
U. S. Circuit Judge.

NATHAN WEBB,
Dist. Judge.

2 *Return of circuit court on writ of error.*

Circuit court of the United States, district of Massachusetts, ss.

And now here, the judges of the circuit court of the United States, in and for the district of Massachusetts, make return of this writ by annexing hereto and sending herewith, under the seal of the said circuit court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof, I, Alexander H. Trowbridge, clerk of said circuit court of the United States, in and for the district of Massachusetts, have hereto set my hand and the seal of said court this twenty-fifth day of March, A. D. 1897.

[SEAL.] ALEX. H. TROWBRIDGE, *Clerk.*

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

At a circuit court of the United States for the first circuit, begun and holden at Boston, within and for the district of Massachusetts, on Thursday, the fifteenth day of October, in the year of our Lord one thousand eight hundred and ninety-six, before the Honorable William L. Putnam, circuit judge.

On the twenty-sixth day of September, A. D. 1896, it was ordered by the court that venires issue for twenty-three grand jurors and fifty-one petit jurors, the grand jurors to come in on Thursday, the fifteenth day of October, A. D. 1896, at ten o'clock a. m., and the petit jurors to come in on Monday, the twenty-sixth day of October, A. D. 1896, next, at ten o'clock a. m., the same to be selected from the cities and towns named in Table No. 50 and apportioned as follows:

	Grand.	Petit.		Grand.	Petit.
Boston	3	8	Hyde Park	2	5
Adams	2	5	Chatham	3	5
Cambridge	3	6	Stoneham	2	5
Woburn	3	6	West Newbury	2	5
Nantucket	2	5	Plainfield	1	1

And thereupon venires were duly issued for said grand and petit jurors.

4 In obedience to the said order of court and to the venires issued thereunder, the following-named grand jurors attended on the fifteenth day of October, A. D. 1896. On that day the said grand jurors were duly empanelled as the grand jury for the October term of this court, A. D. 1896. All of said grand jurors, being empanelled as aforesaid, were duly sworn, except Grand Juror William Merrill, junior, of West Newbury, who duly affirmed, twenty-one grand jurors being in attendance, namely:

1. Albert L. Bowen, foreman ..... of Adams.
2. Erastus T. Bearse ..... " Chatham.
3. Walter E. Collins ..... " Boston.
4. Joseph W. Estabrook ..... " Cambridge.
5. Robert J. Forsythe ..... " West Newbury.
6. Eugene H. Gardner ..... " Plainfield.
7. Lyman Gerry ..... " Stoneham.
8. George G. Hall ..... " Boston.
9. Jacob A. Ham ..... " Woburn.
10. Calvin Hammond ..... " Chatham.
11. William F. Hadley ..... " Stoneham.
12. Horace R. Keay ..... " Cambridge.
13. J. Fred Leslie ..... " Woburn.
14. William A. Mitchell ..... " Woburn.
15. Charles L. Marks ..... " Nantucket.
16. William F. McCluskey ..... " Cambridge.
17. William Merrill, jr ..... " West Newbury.
18. Frank H. Radford ..... " Hyde Park.
19. Levi A. Runnells ..... " Hyde Park.
20. David E. Ray ..... " Nantucket.
21. Thomas Scollen ..... " Adams.

5 On the said fifteenth day of October the said grand jury were charged by the court, the Honorable William L. Putnam, circuit judge, sitting.

On the said fifteenth day of October, A. D. 1896, the following order of court is entered:

ORDER OF COURT.

Ordered, that the petit jurors who have been summoned to appear before the court October 26, 1896, be notified by the marshal that they are not required to appear until Wednesday, November 4, 1896, at 10 a. m.

By the court:

ALEX. H. TROWBRIDGE, *Clerk.*

UNITED STATES BY INDICTMENT *v.* THOMAS BRAM, OTHERWISE CALLED Thomas C. Bram, otherwise called Thomas M. Bram, otherwise called A. Thomas Bram.	No. 1790, Criminal Docket.

At the present term of this court, on the twenty-ninth day of October, A. D. 1896, the Honorable Thomas L. Nelson, district judge, sitting alone and holding this court, the following indictment is presented by the said grand jury; the said grand jury being composed of the said twenty-one grand jurors who were in attendance in the court on the said fifteenth day of October, A. D. 1896.

6 United States of America.

At a circuit court of the United States of America, for the district of Massachusetts, begun and holden at Boston, within and for said district, on the fifteenth day of October, in the year of our Lord one thousand eight hundred and ninety-six.

The jurors for the United States of America, within and for the district of Massachusetts, upon their oath, present that Thomas Bram, otherwise called Thomas C. Bram, otherwise called Thomas M. Bram, otherwise called A. Thomas Bram, mariner, of Boston, in said district of Massachusetts, on the fourteenth day of July, in the year of our Lord one thousand eight hundred and ninety-six, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of a certain vessel of the United States of America, to wit, the barkentine called the "Herbert Fuller," which said vessel was then owned by divers citizens of the United States of America, the names of whom and a more particular description of whom are to said jurors unknown, with force and arms unlawfully, feloniously, wilfully, and of his malice aforethought, in and upon one Charles I. Nash an assault did make; and that the said Thomas Bram, so otherwise called as aforesaid, then and there, to wit, upon the high seas within

the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, with a certain axe, him, the said Charles I. Nash, in and upon the head of the said Charles I. Nash unlawfully, feloniously, wilfully, and of his malice aforethought did strike, penetrate, and wound thereby, then, and
7 there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, giving unto the said Charles I. Nash in and upon the head of the said Charles I. Nash divers mortal wounds, of which said mortal wounds the said Charles I. Nash then and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, died; and so the jurors aforesaid upon their oath aforesaid do say and present that the said Thomas Bram, so otherwise called as aforesaid, unlawfully, feloniously, wilfully, and of his malice aforethought him, the said Charles I. Nash, then and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, in manner and form aforesaid, did kill and murder.

Against the peace and dignity of the United States of America and contrary to the form of the statute in such case made and provided.

And the jurors aforesaid upon their oath aforesaid do further present
and say, that the said district of Massachusetts is the district of
8 the United States of America into which the said Thomas Bram, so otherwise called as aforesaid, was first brought after committing the offence aforesaid.

And the jurors aforesaid for the United States of America, within and for the district of Massachusetts, upon their oath aforesaid do further present that—

Thomas Bram, otherwise called Thomas C. Bram, otherwise called Thomas M. Bram, otherwise called A. Thomas Bram, mariner, of Boston, in said district of Massachusetts, on the fourteenth day of July, in the year of our Lord one thousand eight hundred and ninety-six, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of a certain vessel of the United States of America, to wit, the barkentine called the "Herbert Fuller," which said vessel was then owned by divers citizens of the United States of America, the names of whom and a more particular description of whom are to said jurors unknown, with force and arms unlawfully, feloniously, wilfully, and of his malice aforethought in and upon one Charles I. Nash an assault did make; and that the said Thomas Bram, so otherwise called as aforesaid, then and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, with a certain sharp instrument, the name of which and

a more particular description of which are to said jurors unknown,
9 him the said Charles I. Nash in and upon the head of the said Charles I. Nash unlawfully, feloniously, wilfully, and of his malice aforethought did strike, penetrate, and wound thereby, then, and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, giving unto the said Charles I. Nash in and upon the head of the said Charles I. Nash divers mortal wounds, of which said mortal wounds the said Charles I. Nash then and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, died; and so the jurors aforesaid upon their oath aforesaid do say and present that the said Thomas Bram, so otherwise called as aforesaid, unlawfully, feloniously, wilfully, and of his malice aforethought him the said Charles I. Nash then and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, in manner and form aforesaid, did kill and murder.

Against the peace and dignity of the United States of America and contrary to the form of the statute in such case made and provided.

10 And the jurors aforesaid upon their oath aforesaid do further present and say that the said district of Massachusetts is the district of the United States of America into which the said Thomas Bram, so otherwise called as aforesaid, was first brought after committing the offence aforesaid.

And the jurors aforesaid for the United States of America, within and for the district of Massachusetts, upon their oath aforesaid do further present that—

Thomas Bram, otherwise called Thomas C. Bram, otherwise called Thomas M. Bram, otherwise called A. Thomas Bram, mariner, of Boston, in said district of Massachusetts, on the fourteenth day of July, in the year of our Lord one thousand eight hundred and ninety-six, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of a certain vessel of the United States of America, to wit, the barkentine called the "Herbert Fuller," which said vessel was then owned by divers citizens of the United States of America, the names of whom and a more particular description of whom are to said jurors unknown, with force and arms unlawfully, feloniously, wilfully, and of his malice aforethought in and upon one Laura A. Nash an assault did make, and that the said Thomas Bram, so otherwise called as aforesaid, then and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State

11 thereof and within the jurisdiction of this court, in and on board of said vessel, with a certain axe, her the said Laura A. Nash in and upon the head, face, neck, breast, arms, hands, and other parts of the body of the said Laura A. Nash unlawfully, feloniously, wilfully, and of his

malice aforethought did strike, penetrate, and wound thereby, then, and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, giving unto the said Laura A. Nash in and upon the head, face, neck, breast, arms, hands, and other parts of the body of the said Laura A. Nash divers mortal wounds, of which said mortal wounds the said Laura A. Nash then and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, died; and so the jurors aforesaid upon their oath aforesaid do say and present that the said Thomas Bram, so otherwise called as aforesaid, unlawfully, feloniously, wilfully, and of his malice aforethought her the said Laura A. Nash then and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, in manner and form aforesaid, did kill and murder.

Against the peace and dignity of the United States of America and contrary to the form of the statute in such case made and provided.

12 And the jurors aforesaid upon their oath aforesaid do further present and say that the said district of Massachusetts is the district of the United States of America into which the said Thomas Bram, so otherwise called as aforesaid, was first brought after committing the offence aforesaid.

And the jurors aforesaid for the United States of America, within and for the district of Massachusetts, upon their oath aforesaid do further present that—

Thomas Bram, otherwise called Thomas C. Bram, otherwise called Thomas M. Bram, otherwise called A. Thomas Bram, mariner, of Boston, in said district of Massachusetts, on the fourteenth day of July, in the year of our Lord one thousand eight hundred and ninety-six, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of a certain vessel of the United States of America, to wit, the barkentine called the "Herbert Fuller," which said vessel was then owned by divers citizens of the United States of America, the names of whom and a more particular description of whom are to said jurors unknown, with force and arms unlawfully, feloniously, wilfully, and of his malice aforethought in and upon one Laura A. Nash an assault did make; and that the said Thomas Bram, so otherwise called as aforesaid, then and there, to wit,

13 upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel with a certain sharp instrument, the name of which and a more particular description of which are to said jurors unknown, her the said Laura A. Nash in and upon the head, face, neck, breast, arms, hands, and other parts of the body of the said Laura A. Nash unlawfully, feloniously, wilfully, and of his malice aforethought

did strike, penetrate, and wound, thereby, then, and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, giving unto the said Laura A. Nash, in and upon the head, face, neck, breast, arms, hands, and other parts of the body of the said Laura A. Nash divers mortal wounds, of which said mortal wounds the said Laura A. Nash then and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, died; and so the jurors aforesaid upon their oath aforesaid do say and present that the said Thomas Bram, so otherwise called as aforesaid, unlawfully, feloniously, wilfully, and of his malice aforethought her the said Laura A. Nash then and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of
14 the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, in manner and form aforesaid, did kill and murder.

Against the peace and dignity of the United States of America and contrary to the form of the statute in such case made and provided.

And the jurors aforesaid upon their oath aforesaid do further present and say that the said district of Massachusetts is the district of the United States of America into which the said Thomas Bram, so otherwise called as aforesaid, was first brought after committing the offence aforesaid.

And the jurors aforesaid for the United States of America, within and for the district of Massachusetts, upon their oath aforesaid do further present that

Thomas Bram, otherwise called Thomas C. Bram, otherwise called Thomas M. Bram, otherwise called A. Thomas Bram, mariner, of Boston, in said district of Massachusetts, on the fourteenth day of July, in the year of our Lord one thousand eight hundred and ninety-six, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of a certain vessel of the United States of America, to wit, the barkentine called the "Herbert Fuller," which said vessel was then owned by divers citizens of the United States of America, the names of whom and a more particular description of whom are to said jurors unknown, with force and arms unlawfully, feloniously, wilfully, and of his malice afore-
15 thought in and upon one Laura R. Nash an assault did make; and that the said Thomas Bram, so otherwise called as aforesaid, then and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, with a certain axe her the said Laura R. Nash in and upon the head, face, neck, breast, arms, hands, and other parts of the body of the said Laura R. Nash unlawfully, feloniously, wilfully, and of his malice aforethought did strike, penetrate, and wound thereby, then, and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of

the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, giving unto the said Laura R. Nash in and upon the head, face, neck, breast, arms, hands, and other parts of the body of the said Laura R. Nash divers mortal wounds, of which said mortal wounds the said Laura R. Nash then and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, died; and so the jurors aforesaid upon their oath aforesaid do say and present that the said Thomas Bram, so otherwise called as aforesaid, unlawfully, feloniously, wilfully, and of his malice aforethought her the said Laura R. Nash, then and there, to wit, upon the high seas within the admiralty and maritime jurisdic-
16 tion of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and board of said vessel, in manner and form aforesaid, did kill and murder.

Against the peace and dignity of the United States of America and contrary to the form of the statute in such case made and provided.

And the jurors aforesaid upon their oath aforesaid do further present and say that the said district of Massachusetts is the district of the United States of America into which the said Thomas Bram, so otherwise called as aforesaid, was first brought after committing the offence aforesaid.

And the jurors aforesaid for the United States of America, within and for the district of Massachusetts, upon their oath aforesaid do further present that—

Thomas Bram, otherwise called Thomas C. Bram, otherwise called Thomas M. Bram, otherwise called A. Thomas Bram, mariner, of Boston, in said district of Massachusetts, on the fourteenth day of July, in the year of our Lord one thousand eight hundred and ninety-six, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of a certain vessel of the United States of America, to wit, the barkentine called the "Herbert Fuller," which said vessel was then owned by divers citizens of the United States of America, the names of whom and
17 a more particular description of whom are to said jurors unknown, with force and arms unlawfully, feloniously, wilfully, and of his malice aforethought in and upon one Laura R. Nash an assault did make; and that the said Thomas Bram, so otherwise called as aforesaid, then and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, with a certain sharp instrument, the name of which and a more particular description of which are to said jurors unknown, her the said Laura R. Nash in and upon the head, face, neck, breast, arms, hands, and other parts of the body of the said Laura R. Nash unlawfully, feloniously, wilfully and of his malice aforethought did strike, penetrate, and wound thereby, then, and there,

to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, giving unto the said Laura R. Nash, in and upon the head, face, neck, breast, arms, hands, and other parts of the body of the said Laura R. Nash divers mortal wounds, of which said mortal wounds the said Laura R. Nash then and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said
18 vessel, died; and so the jurors aforesaid upon their oath aforesaid do say and present that the said Thomas Bram, so otherwise called as aforesaid, unlawfully, feloniously, wilfully and of his malice aforethought her the said Laura R. Nash then and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, in manner and form aforesaid, did kill and murder.

Against the peace and dignity of the United States of America and contrary to the form of the statute in such case made and provided.

And the jurors aforesaid upon their oath aforesaid do further present and say that the said district of Massachusetts is the district of the United States of America into which the said Thomas Bram, so otherwise called as aforesaid, was first brought after committing the offence aforesaid.

A true bill:

ALBERT L. BOWEN,
Foreman of the Grand Jury.

JOHN H. CASEY,
Assistant United States Attorney for the District of Massachusetts.

19 On the fourth day of November; A. D. 1896, the petit jurors attended the court pursuant to order of court of October 15th, 1896, hereinbefore set forth, forty-nine being present from the following named cities and towns:

Boston	8	Hyde Park	5
Adams	5	Chatham	5
Cambridge	6	Stoneham	5
Woburn	6	West Newbury	5
Nantucket	3	Plainfield	1

On the sixth day of November, A. D. 1896, at the request of prisoner and in his presence, the court assigns James E. Cotter and Asa P. French as his counsel, the Honorable Le Baron B. Colt, circuit judge, sitting alone and holding the court.

On the said sixth day of November the following pleas and motion are filed.

Plea in abatement.

Now comes Thomas M. Bram and moves that the indictment returned against him in said case be abated, for the following reasons, to wit:

1. Because certain of the grand jurors who found and returned said indictment were not duly sworn before they considered the evidence against said defendant and returned said indictment into court.

2. Because certain of the said grand jurors who acted upon the evidence against the said defendant objected and refused to being sworn, but affirmed.

20 3. The indictment omits to allege that the same was found and presented upon the oath and affirmation of said grand jurors.

THOMAS M. BRAM.

Plea to jurisdiction.

And now comes the said Thomas M. Bram, the defendant named in the indictment found in the above-entitled case, and says that the said court ought not to take cognizance of the crime in the said indictment above specified, because, protesting that he is not guilty of the same, nevertheless, the said Thomas M. Bram says that the said district is not the district wherein said defendant was found or into which he was first brought after the commission of the offience set forth in said indictment; and this the said Thomas M. Bram is ready to verify; wherefore he prays judgment if the said court will or ought to take cognizance of the indictment aforesaid, and by the said court he may be discharged.

THOMAS M. BRAM.

21

Motion to quash.

And now comes the defendant, after return of the indictment into court and before plea, and moves that the indictment in said case be quashed, and for the following reasons, viz:

1. Because the said indictment does not allege and charge any offence with sufficient certainty and precision.
2. Because the said indictment is vague and uncertain.
3. Because different counts are improperly joined or included in same indictment.
4. Because certain of the grand jurors who found and returned said indictment were not duly sworn before they considered the evidence against said defendant and returned said indictment into court.
5. Because certain of the said grand jurors who acted upon the evidence against the said defendant objected and refused to being sworn, but affirmed.
6. The indictment is defective in omitting to allege that said indictment was found and presented upon the oath and affirmation of said grand jurors.

THOMAS M. BRAM.

22 On the said sixth day of November, in the presence of the prisoner, the court assigns Thursday, November 12th, at 11 a. m., as the day for hearing the foregoing pleas and motion, the Honorable Le Baron B. Colt, circuit judge, sitting alone and holding the court.

And on the same day, in the presence of the prisoner, the court orders that the prisoner be held without bail to answer to the indictment. Thereupon a warrant to commit pursuant to the order of court is duly issued and the prisoner is committed to jail thereunder.

On the twefth day of November, A. D. 1896, the following supplementary plea is filed:

Supplementary plea in abatement.

And now comes Thomas M. Bram and moves that the indictment returned against him in said court be abated, for the following reasons, in addition to those set forth in his plea in abatement heretofore filed in said cause, to wit:

Because one of the grand jurors who found and returned said indictment was not duly sworn before said grand jurors considered the evidence against said defendant and returned said indictment into court, and

Because one of the grand jurors who found and returned said indictment was permitted to affirm instead of being sworn without
23 stating and without being asked as to the fact that he was conscientiously scrupulous of being sworn.

THOMAS M. BRAM.

On the said twelfth day of November the following-named affidavits and certificate are filed in support of the foregoing pleas and motion:

Defendant's affidavit, affidavit of Alexander H. Trowbridge, certificate of Alexander H. Trowbridge.

On the thirteenth day of said November the following motions to dismiss are filed, viz:

Motion to dismiss plea in abatement and supplemental plea.

And hereupon Sherman Hoar, the United States attorney for the district of Massachusetts, who prosecutes for the United States of America in this behalf, comes and moves that said plea in abatement and said supplemental plea in abatement be dismissed because

First. Said plea in abatement and said supplemental plea in abatement in form do not contain the required prayer that the indictment be quashed; because

Second. Said plea in abatement and said supplemental plea in abatement were not filed within the time required by the rules of the circuit court; because

Third. Said plea in abatement and said supplemental plea in
24 abatement consist in part of matters in fact outside of the record and such matters of fact are not supported by sufficient affidavit of the defendant or of his attorney; because

Fourth. Said plea in abatement and said supplemental plea in abatement consisting in part of matters outside of the record were not filed within the time required by the rules of this court, supported by sufficient affidavits as in such cases required; because

Fifth. Said plea in abatement and said supplemental plea in abatement did not bear certificate of counsel that said pleas were interposed in good faith and not for purposes of delay; because

Sixth. Said plea in abatement states two distinct defenses as grounds for abating said indictment; because

Seventh. Said plea in abatement states inconsistent grounds for abating said indictment; because

Eighth. Said supplemental plea in abatement states two distinct defenses as grounds for abating said indictment; because

Ninth. Said supplemental plea in abatement states inconsistent grounds for abating said indictment; because

Tenth. Said third specification in said plea in abatement does not set forth any matter upon which a plea in abatement can be founded; because

Eleventh. Said second specification in the said plea in abatement sets forth no cause for abating said indictment; because

25 Twelfth. In said first specification of said supplemental plea in abatement it is not alleged in what particular said one of said grand jurors was not duly sworn; because

Thirteenth. Said second specification of said supplemental plea in abatement sets forth no matter sufficient in law on which to found the abatement of said indictment; because

Fourteenth. Said plea in abatement and said supplemental plea in abatement contain no averment that any of the matters therein stated were to the injury or to the prejudice of the said defendant; because

Fifteenth. None of the matters averred in said plea in abatement and said supplemental plea in abatement were to the injury or to the prejudice of the said defendant.

Wherefore, for the reasons aforesaid in this behalf he, the said Sherman Hoar, for the said United States of America, prays that said plea in abatement and said supplemental plea in abatement be dismissed and that said defendant may answer to the said indictment.

SHERMAN HOAR,
United States Attorney.

26 *Motion to dismiss plea to jurisdiction.*

And hereupon Sherman Hoar, the United States attorney for the district of Massachusetts, who prosecutes for the United States of America in this behalf, comes and moves that said plea to the jurisdiction be dismissed, because

First. That said plea was not filed within the time prescribed by the rules of this court; because

Second. Said plea consisted in part of matters of fact outside the record in this case, which matters of fact were not supported by the affidavit of the defendant or his attorney; because

Third. Said plea is defective and not in proper form, in that it does not state within what jurisdiction the defendant claims the offence described is cognizable; because

Fourth. Said plea is defective and not in proper form in that it does not state or specify any facts sufficient to oust this court of jurisdiction in this behalf.

Wherefore, for the reasons aforesaid in this behalf he, the said Sherman Hoar, for the United States of America, prays that said plea be dismissed and that said defendant may answer to the said indictment.

SHERMAN HOAR,
United States Attorney.

27 The foregoing plea in abatement, supplemental plea in abatement, plea to jurisdiction, and motion to quash thereupon come on to be heard, in the presence of the prisoner, by the court, the Honorable Le Baron B. Colt, circuit judge, and the Honorable Nathan Webb, district judge of the United States for the district of Maine, duly designated and appointed by the Honorable Le Baron B. Colt, circuit judge, to hold the present October term of this circuit court, or any part thereof, in aid of the district judge for the district of Massachusetts, sitting together and holding the court.

Thereupon during said hearing the said plea to the jurisdiction is withdrawn by the defendant.

After arguments of counsel, in the presence of the prisoner, and due consideration by the court, the said plea in abatement, supplemental plea in abatement, and motion to quash are, on the fourteenth day of November, A. D. 1896, in the presence of the prisoner, overruled by the court, the Honorable Le Baron B. Colt, circuit judge, and the Honorable Nathan Webb, district judge for the district of Maine, sitting together as aforesaid and holding the court.

Thereupon, on motion of the attorney for the United States, made in the presence of the prisoner, the said Thomas Bram, otherwise known as aforesaid, is set to the bar and has this indictment read to him; whereupon he says that thereof he is not guilty.

28 It is thereupon, in the presence of the prisoner, ordered by the court that the prisoner at the bar be furnished with a copy of the indictment and a list of the jurors and of the witnesses to be produced on the trial for proving the indictment at least two entire days before the trial, in accordance with the statute, and with process of the court to compel his witnesses to appear at his trial.

The court thereupon, in the presence of the prisoner, assigns December 14th, 1896, at 10 a. m., as the time for the trial to begin.

On the fourteenth day of said November, A. D. 1896, the court orders, in the presence of the prisoner, that venires issue for one hundred additional petit jurors to come in on Monday, the fourteenth day of December, A. D. 1896.

On the seventeenth day of said November, A. D. 1896, an extended order of court for said one hundred additional jurors is entered as follows:

Orders for special venires—Nov. 17, 1896.

Ordered that venires issue for one hundred additional petit jurors to come in on Monday, the fourteenth day of December next, at ten o'clock a. m., from the several cities and towns named in Table No. 50, and apportioned as follows, namely:

Boston	16	Hyde Park	9
Adams	9	Chatham	9
Cambridge	14	Stoneham	9
Woburn	13	West Newbury	9
Nantucket	9	Plainfield	3

By the court:

ALEX. H. TROWBRIDGE, *Clerk.*

29 Pursuant thereto a grand venire is issued and given to the United States marshal for service, together with ten subordinate venires severally directed to the constables of said respective cities and towns for service, upon which grand venire, on the fourteenth day of December, 1896, the marshal makes return into court, as follows:

UNITED STATES OF AMERICA, *District of Massachusetts, ss:*

BOSTON, *December 14th, 1896.*

In obedience to the within precept, I have caused eighty-six good and lawful men to be summoned to serve as petit jurors to come before the October term, 1896, of the circuit court now holden, mentioned in nine venires committed to me at the same time with this precept for distribution, and the names of the persons returned to me by virtue of said venires are herewith returned to court. The venire for Cambridge was not served.

HENRY W. SWIFT,
U. S. Marshal.

Fees:

Paid constables	$18.00
Service	20.00
	$38.00

All of the said subordinate venires so issued as aforesaid, except the subordinate venire directed to either of the constables of the city of Cambridge, were duly served by the constables of the several cities and towns to which they were respectively directed, and the said subordinate venire directed to either of the constables of the city of Cambridge were, on December 12, 1896, returned without service by the constable in whose hands it had been placed.

29a On the seventeenth day of November, A. D. 1896, the prisoner is duly served with a certified copy of the indictment.

On the seventh day of December, A. D. 1896, it is ordered by the court, the honorable Edgar Aldrich, district judge of the United States for the district of New Hampshire, duly assigned to hold said circuit court sitting, that the jurors now present not in case No. 473 be excused until Monday, December 14, 1896, at 10 a. m., namely: Solomon C. Atwood, Theophile Brodeur, Martin Best, T. Weston Bryant, George O. Baird, Elijah Ball, Oliver J. Briggs, James N. Benjamin, James Buckley, Albert Brown, Oliver E. Eldridge, Nelson A. Newhall, Parker H. Nason, and Arthur A. Norcross.

On the ninth day of December, A. D. 1896, the prisoner is duly served with a list of the names and places of abode of the witnesses to be produced at the trial for proving the indictment, and with a list of the names and places of abode of the petit jurors required to attend at the trial, said list of petit jurors containing the names of the

30 additional petit jurors duly served in pursuance of said order of November 14, 1896, and of the venires issued thereunder, and of the names of fourteen petit jurors served in pursuance of said order of September 26, 1896, and of the venires issued thereunder; said fourteen petit jurors being all of said petit jurors served in pursuance of said order of September 26, 1896, and of the venires issued thereunder, who

were still in attendance on the court and not engaged in the trial of any other cause.

Said additional petit jurors, of whom eighty-two attended for the trial of said cause on the fourteenth day of December, A. D. 1896, were apportioned as follows:

Boston	15	Chatham	8
Adams	9	Stoneham	9
Woburn	12	West Newbury	9
Nantucket	8	Plainfield	3
Hyde Park	9		

Said fourteen petit jurors who also then and there attended for the said trial were apportioned as follows:

Boston	2	Stoneham	1
Adams	2	West Newbury	3
Nantucket	1	Plainfield	1
Chatham	2	Cambridge	2

31 On the said fourteenth day of December, the honorable LeBaron B. Colt, circuit judge, and the honorable Nathan Webb, district judge, sitting together and holding the court as aforesaid, the following challenge to the array is filed, with an affidavit of Edward J. Brandon in support thereof:

Challenge to the array and especially to the persons substituted for the jurors ordered to be drawn from Cambridge.

And now comes Thomas M. Bram, the defendant named in said indictment, in his proper person, when the jury is about to be empanelled to try the issue in said indictment, and says that the said array is an illegal one, and that the order of this honorable court in reference to the drawing and apportioning of jurors for the trial of this case from different cities and towns in the district of this court in accordance with the provisions of section 802 of the Revised Statutes of the United States has not been complied with, but has been evaded.

That at a session of this court on the 14th day of November, 1896, the district attorney for the United States for said district moved, in the presence of the defendant in open court, that a special panel, consisting of one hundred jurors, be drawn, from which jurors were to be selected to try the defendant of the offence charged in said indictment; that the defendant, by his counsel, in open court, assented to the said motion of the district attorney. Thereupon, on the 17th day of November,
32 1896, it was ordered by the court that venires issue for one hundred additional jurors to come in on Monday, the 14th day of December, 1896, at 10 o'clock in the forenoon, from the several cities and towns named in table No. 50, and apportioned as follows, viz:

Boston, sixteen; Adams, nine; Cambridge, fourteen; Woburn, thirteen; Nantucket, nine; Hyde Park, nine; Chatham, nine; Stoneham, nine; West Newbury, nine; Plainfield, three.

That the defendant expected that this order of the court would be complied with; that he is advised it was his right, and he desired, and still desires, to be tried by a jury drawn pursuant to that order; that it now appears by the list of jurors presented to the defendant that the

apportionment materially differs from said order of the court, and that by said present list the jurors are unjustly and against the interest of the defendant apportioned as follows, viz:

Boston, seventeen; Adams, eleven; Cambridge, two; Woburn, twelve; Nantucket, nine; Hyde Park, nine; Chatham, eleven; Stoneham, ten; West Newbury, twelve; Plainfield, four.

That the apportionment on said list now before the defendant is contrary to the order of this court and in violation of section 802 of said Revised Statutes.

1st. Because no jurors were drawn from the city of Cambridge under said order of this honorable court of November 17th, 1896; that a larger number of jurors appear upon the list now before the defendant from the towns of Chatham, West Newbury, Plainfield, Stoneham, and
33 Adams than was stated or authorized in said order of November 17th.

2nd. Because the following-named persons upon said list, to wit, Solomon C. Atwood, Theophile Brodeur, Martin Best, T. Weston Bryant, George O. Baird, Elijah Ball, Oliver J. Briggs, James N. Benjamin, James Buckley, Albert Brown, Oliver E. Eldridge, Nelson A. Newhall, Parker H. Nason, and Arthur A. Noreross, have been summoned and have discharged duties as jurors in this court within less than one year of the time assigned for the trial of the defendant, and were not drawn or summoned to attend this special sitting of this court pursuant to said order of November 17th, 1896.

3rd. Because the fourteen jurors last named were without right and without the knowledge or consent of the defendant substituted for the fourteen persons which this court by its order of November 17th ordered to have drawn and returned from the city of Cambridge, and the defendant now objects to such substitution as a violation of his legal rights.

4th. Because the list of jurors now presented to the defendant contains the names of persons not residing within the several cities and towns named in Table No. 50 and in said order of this court dated November 17th, 1896.

5th. That a meeting of the board of aldermen of said city of Cambridge was called for Monday, the 7th day of this month, for the purpose of drawing jurors pursuant to said order of this court. That on said 7th day of December, after notice had issued for said meeting of the
34 board of aldermen of said Cambridge, and before the arrival of the hour for which said meeting had been called, an official of the United States notified the clerk of said city of Cambridge that it would not be necessary to hold said meeting, as no jurors would be needed from said Cambridge, and consequently none were drawn from that city.

6th. Because the venires on which said jurors were drawn were not properly served or by persons qualified to serve the same.

All the foregoing the defendant is ready to verify.

And so the defendant says that the persons named in said list do not constitute a legal jury; that the order of this court was not complied with; that the jurors are not apportioned in such a manner as to be just to the defendant; and this he is ready to verify.

THOMAS M. BRAM.

On the said fourteenth day of December the following replication to the challenge to the array is filed:

Replication to the challenge to the array.

And thereupon Sherman Hoar, attorney for the Unites States of America for the district of Massachusetts, who prosecutes for said United States of America in this behalf, says that by reason of anything in said pleading by Thomas Bram, alias alleged, the said United States of America ought not to be precluded from prosecuting said indict-
35 ment against the said Thomas Bram alias, because he says—

First. That said jury was impartially drawn according to the laws of said United States of America.

Second. That said jury was not selected by design, but was drawn impartially as aforesaid.

Third. That a larger number of jurors does not appear upon the list before the defendant from the towns of Chatham, West Newbury, Plainfield, Stoneham, and Adams than was stated and authorized to be drawn from said towns by orders of this honorable court.

Fourth. That the jurors specifically named in the list in specification two in the defendant's challenge to the array were regularly summoned as jurors in this court for the present October term thereof, and are liable for service, and are now attending said term of court and not engaged in any other trial, and are properly liable to be called as jurors for the trial of said defendant.

Fifth. That the fourteen jurors above mentioned have not been substituted for any other fourteen persons which this honorable court by its order of November 17th ordered to have drawn and returned from the city of Cambridge.

Sixth. That the list of jurors now presented to the defendant contains no names of persons not residing within the several cities and towns named in Table No. 50.

And this the said Sherman Hoar is ready to verify. Wherefore
36 he prays judgment, and that the said Thomas Bram may be required to go before said jury.

SHERMAN HOAR,
U. S. Attorney.

The cause thereupon comes on to be heard by the court in the presence of the prisoner upon the foregoing challenge to the array, and the same, after arguments of counsel, in the presence of the prisoner, and due consideration by the court, is disallowed, in the presence of the prisoner, by the court.

On the same day, to wit, December 14, 1896, before the defendant is set to the bar for trial, the attorney of the United States for said district makes the following endorsement on the indictment:

"Dec. 14, 1896. I will no further prosecute the third, fourth, fifth, and sixth counts in this indictment.

"JOHN H. CASEY,
"*Asst. U. S. Attorney.*"

And thereupon on the same day, before the jury is empanelled and sworn, the said attorney for the United States says in open court, in the presence of the prisoner, that he has nol prossed the indictment as to the third, fourth, fifth, and sixth counts thereof.

Thereupon, in the presence of the prisoner, the entire list of petit jurors served on the prisoner as aforesaid is called, and ninety-six answer to their names.

37 A jury is thereupon, in the presence of the prisoner, from the entire number of jurors so answering to their names, empanelled and duly sworn to try the issue, the prisoner exercising his right to challenge any juror according to law, namely: Rinaldo A. Jack, foreman; Robert S. Brown, Harry J. Booth, Warren N. Blake, Edward J. Burke, Oliver J. Briggs, Sheperd R. Dyer, Abel C. Ford, Stephen H. Green, Charles A. Howes, John J. Hughes, and Henry J. Arnold, the Honorable Le Baron B. Colt, circuit judge, and the Honorable Nathan Webb, district judge, sitting together and holding the court as aforesaid.

On the said fourteenth day of December Francis X. Macdonald, Hugh C. McGonigle, James C. Ruhl, James J. O'Hare, and John J. Harrington, in the presence of the prisoner, are duly sworn as bailiffs to attend the jury empanelled in this cause.

This cause, after a full hearing in the presence of the prisoner, before the court, the Honorable Le Baron B. Colt, circuit judge, and the Honorable Nathan Webb, district judge, sitting together and holding the court as aforesaid, is, in the presence of the prisoner, committed to the said jury, who, in the presence of the prisoner, return their verdict therein, and on oath say that the said Thomas Bram, otherwise known as aforesaid, is guilty.

On the fifth day of January, A. D. 1897, the following motion is filed, namely:

38 *Defendant's motion for a new trial.*

And now comes Thomas M. Bram, the defendant in the above-entitled cause, and moves that the verdict therein be set aside and a new trial ordered, for the following reasons, namely:

First. Because the verdict is against the evidence and the weight thereof.

Second. Because the interruptions, statements of fact and opinions and examinations of witnesses by one member of the court during the trial were partial, argumentative, and unduly prejudicial to the defendant, insomuch that the defendant has been deprived of a fair trial; and because incompetent and prejudical matter introduced by one member of the court by questions and statements and characterizations of the defendant and his testimony, and of the closing argument in his behalf, forced the defendant's counsel to protest in the presence of the jury, and thereby to place themselves in the attitude of antagonizing the opinion of the court in respect to the question of guilt or innocence of the defendant; and because the withdrawal of such matter, statements, opinions, and characterizations (where they were withdrawn) could not and did not remove the unwarrantable influence and prejudice thereby injected into the minds of the jurors.

Third. Because the closing argument of the United States
39 attorney was improper in tone, language, and manner, and because its tendency was, and its effect must have been, to unduly excite the passions of the jury, and to arouse in them a feeling of hatred and contempt for, and prejudice against, the defendant, as well by reason of its said tone, language, and manner, as by unjustifiable inferences and deductions from the testimony, and by innuendoes from assumptions of fact not in evidence; and, further, because he argued upon evidence excluded by the court.

Fourth. Because it appears that the jury misapprehended and misapplied the instructions of the court given them on the morning of Saturday, January second, 1897, when the jury came into court for further instructions, insomuch that they believed, or certain of them believed, that they were then instructed that they must of necessity agree; that the minority must of necessity conform to the opinion of the majority, and that it would not be lawful for them to disagree unless they unanimously concurred in disagreeing.

Fifth. Because it appears that certain of the jurors had prejudged the defendant.

Sixth. Because of the misconduct of certain of the jurors during the trial.

Seventh. Because of the misconduct of certain of the jurors after the case had been given to the jury.

Eighth. Because a certain person or persons in the service of
40 the United States were permitted to and did improperly communicate and intermeddle with certain of the jurors during the progress of the trial.

THOMAS M. BRAM,
By his attorneys
JAMES E. COTTER and
ASA P. FRENCH.

On the fifteenth day of January, A. D. 1897, the following motion is filed, namely:

Motion to amend motion for new trial.

And now comes Thomas M. Bram, the defendant in the above-entitled cause, and moves to amend his motion for a new trial heretofore filed in said cause, by inserting after the paragraph numbered "eighth" therein the following:

Ninth. Because said verdict is against the law.

THOMAS M. BRAM,
By his counsel,
JAMES E. COTTER and
ASA P. FRENCH.

On the sixteenth day of January, A. D. 1897, the following motion is filed, namely:

41 *Motion in arrest of judgment.*

And now comes Thomas M. Bram, the defendant in the above-entitled cause, after verdict therein, and moves the court to arrest judgment in

said cause and to hold the indictment and verdict for naught, for the following reason, to wit:

Because upon the record and proceedings in said cause it does not appear that the barkentine the "Herbert Fuller," upon which the offence alleged in said indictment is charged to have been committed, was a vessel of the United States at the time of the commission of said offence, and that this court rightfully had jurisdiction of said offence.

THOMAS M. BRAM.
By JAMES E. COTTER and
ASA P. FRENCH,
His Counsel.

On the eighteenth day of January, A. D. 1897, the following-named affidavits in support of the motion for new trial are filed, namely:

Affidavit of Harry J. Booth, supplementary affidavit of Harry J. Booth, affidavit of James J. Connell, affidavit of Sylvanus B. Coffin.

On the nineteenth day of January, A. D. 1897, the following-named affidavits in support of motion for new trial are filed, namely:

Affidavit of Asa P. French, affidavit of James E. Cotter.

42 On the same day the specifications on said motion for new trial are filed.

On the twentieth day of January, A. D. 1897, an affidavit of Thomas M. Bram on said motion is filed.

On the twenty-first day of January, A. D. 1897, specifications under third ground alleged in motion for new trial are filed.

The cause thereupon, in the presence of the prisoner, comes on to be heard by the court on the foregoing motion for new trial, the Honorable Le Baron B. Colt, circuit judge, and the Honorable Nathan Webb, district judge, sitting together and holding the court as aforesaid, and, in the presence of the defendant, is fully heard upon arguments of counsel for the defendant and for the Government.

At said hearing the motion to amend the motion for new trial is waived by the defendant.

On the eighth day of February, A. D. 1897, the following motion is filed, namely:

Motion for new trial on ground of newly discovered evidence.

And now comes Thomas M. Bram, the defendant in the above-entitled cause, and moves the court to set aside the verdict therein and order a new trial on the ground that certain new evidence has been discovered since the rendering of said verdict material to the issue involved in said indictment, the character of which evidence will more fully appear
43 from the affidavits of Jonathan Spencer, Wallace Downey, and Hugh G. Messenger, filed herewith, and reference to which is hereby made.

By his counsel:

JAMES E. COTTER.
ASA P. FRENCH.

We hereby certify that the information contained in the affidavits above referred to, upon which the foregoing motion is based, was not

obtained by us and could not of necessity have been obtained by us, by the exercise of due diligence, until after the rendering of the verdict in said cause.

JAMES E. COTTER.
ASA P. FRENCH.

In support of said last-mentioned motion the following-named affidavits are filed:

Affidavit of Hugh G. Messenger, affidavit of Wallace Downey, affidavit of Jonathan Spencer.

On the ninth day of February, A. D. 1897, the motion for new trial, filed January 5, 1897, is, in the presence of the prisoner, denied by the court, the Honorable Le Baron B. Colt, circuit judge, and the Honorable Nathan Webb, district judge, sitting together and holding the court as aforesaid.

On the said ninth day of February the defendant withdraws his motion in arrest of judgment filed on the sixteenth day of January, A. D. 1897.

On the tenth day of February, A. D. 1897, the following-named
44 affidavits are filed in support of the motion for new trial on the ground of newly discovered evidence:

Affidavit of Thomas M. Bram, affidavit of James E. Cotter, affidavit of Asa P. French.

Thereupon, in the presence of the prisoner, the cause comes on to be heard and is fully heard by the court on the motion for new trial on the ground of newly discovered evidence, the Honorable Le Baron B. Colt, circuit judge, and the Honorable Nathan Webb, district judge, sitting together and holding the court as aforesaid.

On the twelfth day of February, A. D. 1897, after due consideration by the court, the Honorable Le Baron B. Colt, circuit judge, and the Honorable Nathan Webb, district judge, sitting together and holding the court as aforesaid, the motion for new trial on the ground of newly discovered evidence is, in the presence of the prisoner, denied.

On the fourth day of March, A. D. 1897, the defendant in person presents the following bill of exceptions for allowance in open court, and there being no objections thereto the same is signed and allowed by the court, the Honorable Le Baron B. Colt, circuit judge, and the Honorable Nathan Webb, district judge, sitting together and holding the court as aforesaid, and thereupon the same is ordered to be entered of record.

45 United States of America. Circuit court of the United States, district of Massachusetts.

UNITED STATES
v.
THOMAS BRAM, ALIAS. } No. 1790.

Before Circuit Judge Colt and District Judge Webb.

BILL OF EXCEPTIONS.

Be it remembered, that the barkentine "Herbert Fuller" sailed from Boston on the 2nd day of July, 1896, bound for Rosario, on the river

Platte above Buenos Ayres, South America, with a cargo of lumber under and on deck.

She had on board a captain, Charles I. Nash; Bram, the defendant; a second mate, August W. Blomberg; a steward, and six seamen; also the captain's wife, Laura A. Nash, and one passenger, Lester H. Monks.

The vessel proceeded on her course toward her port of destination until the night between July 13 and July 14. On that night at 12 o'clock the second mate's watch was relieved by the mate's watch, of which Bram, the defendant, was the officer in charge. The captain, his wife, the passenger, Monks, and the first mate and the second mate all lived in the aftercabin, occupying separate rooms. A draft of the aftercabin
46 is annexed as part of this statement of facts. The crew and the steward slept forward in the forward house.

When the watch was changed at midnight, Bram, the defendant, took the deck, the seamen Loheac and Perdok went forward on the lookout, and Charles Brown, otherwise called Justus Leopold Westerberg, his true name, took the wheel, where it was his duty to remain till two o'clock, at about which time he was relieved by Loheac. The second mate went to his room and the seamen of his watch to their quarters at twelve midnight, and there was no evidence that any of them or the steward appeared again till daylight.

The passenger, Monks, who occupied a room on the starboard side of the cabin, between the chart room where the captain slept and the room on the forward starboard side where Mrs. Nash slept, with doors opening from the passenger's room into both the chart room used by the captain as his room and that of Mrs. Nash, was aroused not far from two o'clock—the exact time is not known, as he says—by a scream and by another sound characterized by him as a gurgling sound. He arose, went to the captain's room, and found the captain's cot overturned and the captain lying on the floor by it. He spoke, but got no answer; put his hand on the captain's body and found it damp or wet. He then went to Mrs. Nash's room; did not see her, but saw dark spots on her bedding and suspected something wrong. He went on deck and called the mate, the defendant, telling him the captain was killed. Both went below, took down the lantern hanging in the main cabin, burning dimly, turned it up and went
47 through the captain's room to the passenger's room, and the passenger there put on a shirt and pantaloons. They then both returned to the deck, the mate on the way stopping a brief time in his own room. Bram and Monks remained talking on deck till about daybreak, when the steward was called and told what had happened. Up to this time no call had been made for the second mate, nor had anyone visited his room. Later it was found that Captain Nash, his wife, and Blomberg, the second mate, were all dead, each with several wounds upon the head, apparently given with a sharp instrument like an axe, penetrating the skull and into the substance of the brain, and the second mate lying on his back with his feet crossed, in his berth; Mrs. Nash in her bed, in her room, and at the back side of the bed, and Captain Nash in his room, as already stated.

The whole crew was called at or about daylight, and were informed of the deaths.

The bodies were removed from the cabin and placed in the jolly boat, and the boat was towed astern to Halifax. The cabin was then locked,

Bram taking the keys, and it remained locked till the vessel reached Halifax.

At first after the discovery of the murders there was some hesitancy as to where the vessel should go. At the defendant's suggestion she was headed to go to Cayenne, in French Guiana, but the plan was changed and she steered for Halifax, Nova Scotia, where she arrived July 21, and was taken possession of by the local authorities at the instance of the consul-general of the United States.

48 At first after the discovery of the murders, Bram on whom had devolved the command of the ship, made Brown chief mate and Loheac second mate.

No blood or spots of blood were ever discovered on the person or the clothing of any person on board, nor did anything direct suspicion to anyone.

In a day or two, suspicion having been excited in respect to the seaman Brown, the crew, under the supervision of Bram, seized him, he not resisting, and put him in irons. All the while the officers and seamen remained on deck. Bram navigated the ship until Sunday before they reached Halifax on Tuesday, and after the land of Nova Scotia was in sight, when, Brown having stated to his shipmates, or some of them, that he saw into the cabin through a window in the afterpart and on the starboard side of the house, and saw Bram, the mate, kill the captain. In consequence of this statement of Brown, the crew, led by the steward, suddenly overpowered the mate and put him in irons, he making no resistance, but declaring his innocence. Bram and Brown were both carried into Halifax in irons.

At Halifax all the officers, the crew, and the passenger were examined before the American consul, and gave their statements, which were reduced to writing and sworn to.

All were kept in confinement at Halifax, and Bram was brought before one Powers, a local official detective, and was searched by him and conversation was had with him.

Subsequently the crew, including Bram and Brown and the pas-
49 senger, Monks, at the request of the United States authorities, were sent by steamer direct from Halifax to Boston, and there delivered to the authorities, who lodged them all in jail.

Upon complaint of the United States district attorney, and hearing thereon before a commissioner of the United States circuit court, Bram and Brown were committed to await the action of the grand jury, and all the witnesses except Monks, the passenger, and Spencer, the steward, were restrained in jail, being unable to furnish bail.

When the grand jury were in attendance, Brown was called as a witness before them. Bram did not testify before the grand jury.

Bills of indictment were returned against Bram for the murders of Captain Nash, Mrs. Nash, and the second mate, Blomberg.

No indictment was found against Brown.

At the United States circuit court begun and held at Boston, in the district of Massachusetts, on the fifteenth day of October, A. D. 1896, to wit, on the twenty-ninth day of October, A. D. 1896, the grand jury returned an indictment against Thomas M. Bram for the murder of Charles I. Nash and Laura A. Nash, on the fourteenth day of July,

A. D. 1896, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of said court, in and on board of a certain vessel of the United States of America, to wit, the barkentine called the "Herbert Fuller."

The said indictment was in the words and figures following, viz:

50 The United States of America.

At a circuit court of the United States of America for the district of Massachusetts, begun and holden at Boston, within and for said district, on the fifteenth day of October, in the year of our Lord one thousand eight hundred and ninety-six.

The jurors for the United States of America within and for the district of Massachusetts, upon their oath present that Thomas Bram, otherwise called Thomas C. Bram, otherwise called Thomas M. Bram, otherwise called A. Thomas Bram, mariner, of Boston, in said district of Massachusetts, on the fourteenth day of July, in the year of our Lord one thousand eight hundred and ninety-six, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of a certain vessel of the United States of America, to wit, the barkentine called the "Herbert Fuller," which said vessel was then owned by divers citizens of the United States of America, the names of whom and a more particular description of whom are to said jurors unknown, with force and arms unlawfully, feloniously, wilfully, and of his malice aforethought in and upon one Charles I. Nash an assault did make; and that the said Thomas Bram, so otherwise called as aforesaid, then and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and

51 out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, with a certain axe, him the said Charles I. Nash in and upon the head of the said Charles I. Nash unlawfully, feloniously, wilfully, and of his malice aforethought did strike, penetrate, and wound thereby, then, and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, giving unto the said Charles I. Nash in and upon the head of the said Charles I. Nash divers mortal wounds of which said mortal wounds the said Charles I. Nash then and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, died; and so the jurors aforesaid upon their oath aforesaid do say and present that the said Thomas Bram, so otherwise called as aforesaid, unlawfully, feloniously, wilfully, and of his malice aforethought him the said Charles I. Nash then and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, in manner and form aforesaid did kill and murder.

Against the peace and dignity of the United States of America and contrary to the form of the statute in such case made and provided.

52 And the jurors aforesaid upon their oath aforesaid do further present and say that the said district of Massachusetts is the district of the United States of America into which the said Thomas Bram, so otherwise called as aforesaid, was first brought after committing the offence aforesaid.

And the jurors aforesaid for the United States of America, within and for the district of Massachusetts, upon their oath aforesaid do further present that—

Thomas Bram, otherwise called Thomas C. Bram, otherwise called Thomas M. Bram, otherwise called A. Thomas Bram, mariner, of Boston, in said district of Massachusetts, on the fourteenth day of July, in the year of our Lord one thousand eight hundred and ninety-six, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of a certain vessel of the United States of America, to wit, the barkentine called the "Herbert Fuller," which said vessel was then owned by divers citizens of the United States of America, the names of whom and a more particular description of whom are to said jurors unknown, with force and arms unlawfully, feloniously, wilfully, and of his malice aforethought in and upon one Charles I. Nash an assault did make; and that the said Thomas Bram, so otherwise called as aforesaid, then and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on

53 board of said vessel, with a certain sharp instrument, the name of which and a more particular description of which are to said jurors unknown, him the said Charles I. Nash in and upon the head of the said Charles I. Nash unlawfully, feloniously, wilfully, and of his malice aforethought did strike, penetrate, and wound thereby, then, and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, giving unto the said Charles I. Nash in and upon the head of the said Charles I. Nash divers mortal wounds, of which said mortal wounds the said Charles I. Nash then and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, died; and so the jurors aforesaid upon their oath aforesaid do say and present, that the said Thomas Bram, so otherwise called as aforesaid, unlawfully, feloniously, wilfully, and of his malice aforethought him the said Charles I. Nash then and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, in manner and form aforesaid, did kill and murder.

Against the peace and dignity of the United States of America and contrary to the form of the statute in such case made and provided.

54 And the jurors aforesaid upon their oath aforesaid do further present and say that the said district of Massachusetts is the district of the United States of America into which the said Thomas Bram, so otherwise called as aforesaid, was first brought after committing the offence aforesaid.

And the jurors aforesaid, for the United States of America, within and for the district of Massachusetts, upon their oath aforesaid, do further present that—

Thomas Bram, otherwise called Thomas C. Bram, otherwise called Thomas M. Bram, otherwise called A. Thomas Bram, mariner, of Boston, in said district of Massachusetts, on the fourteenth day of July, in the year of our Lord one thousand eight hundred and ninety-six, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of a certain vessel of the United States of America, to wit, the barkentine called the "Herbert Fuller," which said vessel was then owned by divers citizens of the United States of America, the names of whom, and a more particular description of whom are to said jurors unknown, with force and arms unlawfully, feloniously, wilfully, and of his malice aforethought in and upon one Laura A. Nash an assault did make, and that the said Thomas Bram, so otherwise called as aforesaid, then and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, with a certain axe, her the said Laura A.

55 Nash in and upon the head, face, neck, breast, arms, hands, and other parts of the body of the said Laura A. Nash unlawfully, feloniously, wilfully, and of his malice aforethought did strike, penetrate, and wound thereby, then, and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, giving unto the said Laura A. Nash in and upon the head, face, neck, breast, arms, hands, and other parts of the body of the said Laura A. Nash divers mortal wounds, of which said mortal wounds the said Laura A. Nash then and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, died; and so the jurors aforesaid upon their oath aforesaid do say and present that the said Thomas Bram, so otherwise called as aforesaid, unlawfully, feloniously, wilfully, and of his malice aforethought her the said Laura A. Nash then and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, in manner and form aforesaid, did kill and murder,

Against the peace and dignity of the United States of America and contrary to the form of the statute in such case made and provided.

56 And the jurors aforesaid upon their oath aforesaid do further present and say that the said district of Massachusetts is the district of the United States of America into which the said Thomas Bram, so otherwise called as aforesaid, was first brought after committing the offence aforesaid.

And the jurors aforesaid for the United States of America, within and for the district of Massachusetts, upon their oath aforesaid, do further present that

Thomas Bram, otherwise called Thomas C. Bram, otherwise called Thomas M. Bram, otherwise called A. Thomas Bram, mariner, of Boston, in said district of Massachusetts, on the fourteenth day of July, in the year of our Lord one thousand eight hundred and ninety-six, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of a certain vessel of the United States of America, to wit, the barkentine called the "Herbert Fuller," which said vessel was then owned by divers citizens of the United Sates of America, the names of whom and a more particular description of whom are to said jurors unknown, with force and arms unlawfully, feloniously, wilfully, and of his malice aforethought in and upon one Laura A. Nash an assault did make; and that the said Thomas Bram, so otherwise called as aforesaid, then and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on

57 board of said vessel, with a certain sharp instrument, the name of which and a more particular description of which are to said jurors unknown, her the said Laura A. Nash in and upon the head, face, neck, breast, arms, hands, and other parts of the body of the said Laura A. Nash unlawfully, feloniously, wilfully, and of his malice aforethought did strike, penetrate, and wound thereby, then, and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, giving unto the said Laura A. Nash in and upon the head, face, neck, breast, arms, hands, and other parts of the body of the said Laura A. Nash divers mortal wounds, of which said mortal wounds the said Laura A. Nash then and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, died; and so the jurors aforesaid upon their oath aforesaid do say and present that the said Thomas Bram, so otherwise called as aforesaid, unlawfully, feloniously, wilfully, and of his malice aforethought her the said Laura A. Nash then and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, in manner and form aforesaid, did kill and murder.

58 Against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided.

And the jurors aforesaid upon their oath aforesaid do further present and say that the said district of Massachusetts is the district of the United States of America into which the said Thomas Bram, so otherwise called as aforesaid, was first brought after committing the offence aforesaid.

And the jurors aforesaid for the United States of America, within and for the district of Massachusetts, upon their oath aforesaid do further present that—

Thomas Bram, otherwise called Thomas C. Bram, otherwise called Thomas M. Bram, otherwise called A. Thomas Bram, mariner, of Boston, in said district of Massachusetts, on the fourteenth day of July, in the year of our Lord one thousand eight hundred and ninety-six, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of a certain vessel of the United States of America, to wit, the barkentine called the "Herbert Fuller," which said vessel was then owned by divers citizens of the United States of America, the names of whom and a more particular description of whom are to said jurors unknown, with force and arms, unlawfully, feloniously, wilfully, and of his malice aforethought in and upon one Laura R. Nash an assault did make;

59 and that the said Thomas Bram, so otherwise called as aforesaid, then and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, with a certain axe her the said Laura R. Nash in and upon the head, face, neck, breast, arms, hands, and other parts of the body of the said Laura R. Nash unlawfully, feloniously, wilfully, and of his malice aforethought did strike, penetrate, and wound thereby, then, and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, giving unto the said Laura R. Nash in and upon the head, face, neck, breast, arms, hands, and other parts of the body of the said Laura R. Nash divers mortal wounds, of which said mortal wounds the said Laura R. Nash then and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and board of said vessel, died; and so the jurors aforesaid upon their oath aforesaid do say and present that the said Thomas Bram, so otherwise called as aforesaid, unlawfully, feloniously, wilfully, and of his malice aforethought her the said Laura R. Nash then and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the juris-

60 diction of this court, in and on board of said vessel, in manner and form aforesaid, did kill and murder.

Against the peace and dignity of the United States of America and contrary to the form of the statute in such case made and provided.

And the jurors aforesaid upon their oath aforesaid do further present and say that the said district of Massachusetts is the district of the United

States of America into which the said Thomas Bram, so otherwise called as aforesaid, was first brought after committing the offence aforesaid.

And the jurors aforesaid for the United States of America, within and for the district of Massachusetts, upon their oath aforesaid do further present that—

Thomas Bram, otherwise called Thomas C. Bram, otherwise called Thomas M. Bram, otherwise called A. Thomas Bram, mariner, of Boston, in said district of Massachusetts, on the fourteenth day of July, in the year of our Lord one thousand eight hundred and ninety-six, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of a certain vessel of the United States of America, to wit, the barkentine called the "Herbert Fuller," which said vessel was then owned by divers citizens of the United States of America, the names of whom and a more particular description of whom are to said jurors unknown, with

61 force and arms unlawfully, feloniously, wilfully, and of his malice aforethought in and upon one Laura R. Nash an assault did make; and that the said Thomas Bram, so otherwise called as aforesaid, then and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, with a certain sharp instrument, the name of which and a more particular description of which are to said jurors unknown; her the said Laura R. Nash in and upon the head, face, neck, breast, arms, hands, and other parts of the body of the said Laura R. Nash unlawfully, feloniously, wilfully, and of his malice aforethought did strike, penetrate, and wound thereby, then, and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, giving unto the said Laura R. Nash in and upon the head, face, neck, breast, arms, hands, and other parts of the body of the said Laura R. Nash divers mortal wounds, of which said mortal wounds the said Laura R. Nash then and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, died; and so the jurors aforesaid, upon their oath aforesaid, do say and present that the said Thomas Bram, so otherwise called as aforesaid, unlawfully, feloniously, wilfully, and of his malice aforethought her the said Laura

62 R. Nash then and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, in manner and form aforesaid, did kill and murder.

Against the peace and dignity of the United States of America and contrary to the form of the statute in such case made and provided.

And the jurors aforesaid upon their oath aforesaid do further present and say that the said district of Massachusetts is the district of the

United States of America into which the said Thomas Bram, so otherwise called as aforesaid, was first brought after committing the offence aforesaid.

A true bill.

ALBERT L. BOWEN,
Foreman of the Grand Jury.

JOHN H. CASEY,
Assistant United States Attorney for the District of Massachusetts.

63 Before his arraignment upon this indictment, Thomas M. Bram, said defendant, duly filed a plea to the jurisdiction of the said court, and pleas in abatement; also a motion to quash, of which several pleas the following are true copies:

[Caption omitted.]

Plea in abatement.

Now comes Thomas M. Bram and moves that the indictment returned against him in said case be abated for the following reasons, to wit:

1. Because certain of the grand jurors who found and returned said indictment were not duly sworn before they considered the evidence against said defendant and returned said indictment into court.

2. Because certain of the said grand jurors who acted upon the evidence against the said defendant objected and refused to being sworn, but affirmed.

3. The indictment omits to allege that the same was found and presented upon the oath and affirmation of said grand jurors.

(Signed.)

64 THOMAS M. BRAM.

[Caption omitted.]

Supplementary plea in abatement.

And now comes Thomas M. Bram and moves that the indictment returned against him in said court be abated for the following reasons, in addition to those set forth in his plea in abatement heretofore filed in said cause, to wit:

Because one of the grand jurors who found and returned said indictment was not duly sworn before said grand jurors considered the evidence against said defendant and returned said indictment into court; and

Because one of the grand jurors who found and returned said indictment was permitted to affirm instead of being sworn, without stating and without being asked as to the fact that he was conscientiously scrupulous of being sworn.

THOMAS M. BRAM.

[Caption omitted.]

Motion to quash.

And now comes the defendant, after return of the indictment into court and before plea, and moves that the indictment in said case be quashed, and for the following reasons, viz:

1. Because the said indictment does not allege and charge any offence with sufficient certainty and precision.

2. Because the said indictment is vague and uncertain.

65 3. Because different counts are improperly joined or included in same indictment.

4. Because certain of the grand jurors who found and returned said indictment were not duly sworn before they considered the evidence against said defendant and returned said indictment into court.

5. Because certain of the said grand jurors who acted upon the evidence against the said defendant objected and refused to being sworn, but affirmed.

6. The indictment is defective in omitting to allege that said indictment was found and presented upon the oath and affirmation of said grand jurors.

THOMAS M. BRAM.

[Caption omitted.]

Plea to jurisdiction.

And now comes the said Thomas M. Bram, the defendant named in the indictment found in the above entitled case, and says that the said court ought not to take cognizance of the crime in the said indictment above specified, because, protesting that he is not guilty of the same, nevertheless, the said Thomas M. Bram says that the said district is not the district wherein said defendant was found or into which he was first brought after the commission of the offence set forth in said indictment; and this the said Thomas M. Bram is ready to verify; wherefore he prays judgment if the said court will or ought to take cognizance

66 of the indictment aforesaid; and that by the said court he may be discharged.

THOMAS M. BRAM.

[Caption omitted.]

Defendant's affidavit in support of his special pleas and motion.

I, Thomas M. Bram, the defendant in the above entitled causes, on oath depose and say that I believe, and have reason to believe, that the facts alleged in said pleas are true.

THOMAS M. BRAM.

The above was duly sworn to on Nov. 12, 1896.

The aforesaid plea to the jurisdiction was withdrawn by the defendant after argument upon the several pleas aforesaid, and the motion to quash, but before any ruling upon any of them by the court.

Thereupon, at the hearing of the pleas in abatement, it appeared that when the grand jurors were empanelled, one of them, being one of the panel who found said indictment, upon being called to be sworn, stated that he affirmed and declined to take an oath, and after his fellows had been regularly sworn he was formally affirmed to the same duties specified in the oath administered to the others.

The court ruled upon and overruled the pleas in abatement and motion to quash as follows:

67 "It is first to be noted that this plea itself sets out that the jury were either qualified by taking an oath or were qualified by

taking an affirmation, so that any suggestion that appears on the face
the plea, or in argument, that any person not properly qualified a
authorized was admitted to the grand jury room and took part in th
deliberation, and joined in the action of the grand jury in returning t
indictment into court, is negatived by the plea itself.

"The suggestion of the district attorney that the jury consisted
twenty-one members, as it is by record, and that by law the concurren
of only twelve is necessary for the return of a valid and sufficient indi
ment, we do not hold a valid argument, because we are of opinion th
if it were shown to us that any stranger to a legally and properly co
stituted grand jury was admitted to its deliberations and was prese
while they conferred together upon the evidence and upon the propri
of returning a bill of indictment the whole proceeding would be ba
It would be impossible for the court or anybody to measure the infl
ence of that stranger upon his fellows in the grand jury room, an
especially in a capital case the court should take no risks by an assump
tion that those who concurred were all properly qualified to act, nor d
we perceive how that fact itself could be shown except by calling all th
grand jury and putting every one upon his oath to determine what pa
he took in the return of this indictment.

"But we hold further that under the Statutes of the Unite
68 States, adopting by reference the law of the State of Massachusetts
the requirement of an oath is satisfied by the taking of an affirmatio
in judicial or legal form. The exact words of the statute we will quote
'By making affirmation in judicial form.' Nor do we hold it necessar
for the record to show just the circumstances under which the juror wa
admitted to affirm. Were it necessary so to decide, which it must b
understood we do not find it necessary to do, and therefore do not decide
we should be inclined to the view that where an affirmation is adminis
tered to a grand juror upon his own objection to taking an oath in th
presence of a court and with the consent of the presiding justice, n
objection being made at the time, it is to be presumed that the affirmatio
was properly administered to him and for proper reasons.

"The section of the statute of Massachusetts which says: 'Person
having conscientious scruples may be allowed to affirm instead of taking
an oath,' provides no way by which the court can determine his conscien
tious scruples. It must depend upon his own assertion. We know of
no way by which the conscience can be searched by evidence to contradict
the statement he himself makes in regard to his scruples, and the sug
gestion that the right to take the affirmation instead of an oath is not
wholly discretionary with the party who asks the privilege is more plausi
ble than real, because the party has the discretion to declare his scruples
and as to the privilege the court has nothing to do but allow it under the
statute.

69 "But we do not dispose of this part of the case upon that ground.
We regard the objection as falling clearly within the provisions of
section 1025, Revised Statutes, which holds and declares that 'No indict
ment found and presented by a grand jury in any district or circuit or
other court of the United States shall be deemed insufficient, nor shall a
trial, judgment, or other proceeding thereon be affected by reason of any
defect or imperfection in matter of form only which shall not tend to the

prejudice of the defendant.' And we do not readily conceive of any matter which can be more a matter of form than the mere declaration in the indictment returned by the grand jury that they were acting under oath. We believe that they were within the law acting under oath in this case. But the more conclusive reason for our decision is that this is a purely formal objection, which can in no way prejudice him in making his defence. The defence comes upon other matters altogether.

"I am reminded that by statute an affirmation in judicial form answers all the requirements of an oath, and we must therefore hold that this indictment setting out that the jury were acting under oath would be strictly sufficient to include the case of parties some of whom affirmed instead of taking an oath.

"We have thus far gone over all the points in the plea in abatement, and the result is the plea is overruled and the party will be held to answer to the indictment.

"Now comes the motion to quash; but before proceeding further in these matters we wish to say that we have not been unmindful
70 of the district attorney's motion to dismiss all these pleas and motions, but in view of the somewhat irregular manner in which we grouped all these questions together, and heard the whole matter together, we deemed it better to examine the merits of the motion and pleas, the result of which will be the same thing in the effect upon these proceedings as if we had considered the motion (of U. S. attorney to dismiss). It is a somewhat irregular proceeding to allow a motion to dismiss a plea—although there is an authority for so doing—rather than to have the plea demurred to and overruled at the proper hearing. We have taken no action, therefore, upon the grounds of the motion of the district attorney.

"The motion to quash is upon these grounds: 'Because said indictment does not allege and charge any offence with sufficient certainty and precision.' Neither in the argument nor in the motion are we sufficiently instructed as to where this supposed lack of precision appears. The second is only a repetition of the same in other phraseology: 'Because said indictment is vague and uncertain.'

"Now, upon careful inspection of both indictments (N. B. The pleas and motion were urged against two indictments; the one on which a trial was had and one on which no trial has been had), which I hold here, having obtained them from the clerk this morning to make a final examination of them, we do not find that objection supported. The indictment sets out the name of the defendant; it sets out the place of the commission of the supposed offence; it sets out the time in which it was com-
71 mitted; it sets out the person upon whom it was committed; it sets out the manner in which and the means by which it was committed; it sets out the malice for its commission and by proper terms of art includes all the expressions necessary for an indictment in a capital case; it sets out the death in consequence of the use of those means; and it sets out—which in any branch of the case is not passed upon—the jurisdiction of the court, and it sets out that this is the district into which the party was brought, and where the trial under the statute must be had. We do not see any vagueness or uncertainty in the indictment, so that we can not support that ground of the motion.

"Third. 'Because different counts are improperly joined or included in the same indictment.' The argument proceeds upon the basis and theory that while such a joinder of different offences and of different counts is permissible only in cases of misdemeanor it is not so in regard to felonies. It is to be observed that the statute of the United States, which not only allows but practically requires the district attorney so to join counts, makes no discrimination between misdemeanors and felonies. The language of the statute is: Acts or transactions connected together, or two or more acts or transactions of the same class of crimes or offences (not misdemeanors), and is broad enough to include both misdemeanors and felonies. (Section 1024 of the Revised Statutes.) Moreover, we think it sufficiently appears in the indictment that these crimes or offences or acts were of the same class and were so connected together. These
72 transactions are alleged in every count to have happened on the same day and in the narrow space of a vessel upon the high seas. The charge is murder in every count. It is averred to have occurred at the same place and at the same time, and the locus in which the offences, if any, were committed is, as I said, within the narrow limits of a vessel upon the high seas.

"Moreover, the decision of the Supreme Court of the United States, which I handed to counsel yesterday, in the case of McElroy v. United States, delivered at this present October term, 1896, of the Supreme Court, deals with this very question and holds that the permission to join or the requirement of the attorney or prosecutor to elect is largely a matter of discretion for the court.

"We do not approve of the practice of uniting in one indictment charges for two distinct capital offences, and we should be disposed in this case, upon proper motions at a later time, to call upon the district attorney to narrow his prosecution to a single charge, which might be done either by election or, better still, by a nol pros of the counts which relate to one of the two persons alleged to be (have been) killed. There are reasons for such a course, looking to public interests. There are also reasons for such a course, looking to the full protection of the defendant, but as a motion to quash, we do not think the grounds sufficient.

"The motion then proceeds: As to the averments 4, 5, and 6, with regard to the oath or affirmation of the grand jurors and the failure to set out in the indictment that there was oath and affirmation, we
73 have sufficiently treated that in what has been said with regard to the pleas in abatement. It will not be repeated. The ground does not strike us as tenable.

"In the argument in support of the motion to quash and pleas in abatement, the argument does not confine itself systematically to the several points, but they have been mixed together. The same objection applies to the lack of proper averment of time and place, and the objection runs to the whole of the counts; not to some specific count, but to every count.

"Now, it is familiar law that in a criminal proceeding it is incumbent on the Government to aver with regularity and distinctness both time and place. It is also familiar law that it is never compelled to prove

time and place exactly as averred, except when time and place enter into the substance of the offence. Place here does enter into the question of jurisdiction; time does not. It should appear in the course of the trial that the actual time of the occurrences was not affected by the statute of limitation.

"No suggestion whatever has been made here that whatever took place on board this barkentine Herbert Fuller, whereby certain persons lost their lives, is not within the period in which the prosecution is allowed. An inspection of the indictments and of the several counts in them shows beyond all peradventure that the Government in its indictment has exactly, explicitly, and clearly alleged, wherever such an allegation is required, a time and a place. It is true that there has been greater particu-
74 larity in setting out the place than in setting out the time, but the averment of time refers to an earlier and distinct declaration of the day, and each count commences with an averment that on the fourteenth day of July, 1896, at a place on the high seas, on board an American vessel, out of the jurisdiction of any particular State and within the jurisdiction of this court, certain things were done. Thereafter when it refers to time and place it uses the common form of expression 'then and there,' and expands the word 'there' without an expansion of the word 'then.' It certainly could not impair the sufficiency of the averment of time by reference of the word 'then' because he saw fit not to rely upon the word 'there' as a sufficient reference to place, but explains what should be meant by that. So we think there is nothing in this objection.

"The result of our deliberation of the hearing is that the motion to quash is overruled, the pleas in abatement are overruled, the plea to the jurisdiction has not been before us—that is to say, in the final action it has been withdrawn and is not before us—and it then only remains for the defendant to plead to the indictment, and he should at this time be arraigned, unless for good cause shown a later day is fixed. It is the purpose of the court to have the arraignment at this time unless, as I say, good reason for postponement is shown; and then to arrange a day at which the trial shall proceed without interruption until the whole matter is disposed of."

The defendant thereupon excepted to the court's conclusions as to matters of law as to the matter of the plea in abatement, and especially that which referred to the qualifications of the grand juror Merrill—
75 the juror who affirmed—and to the fact that it did not appear that he had conscientious scruples against taking an oath. The defendant also excepted to the court's conclusions as to the matter of law as to the improper joinder of counts in the indictment without an averment that they referred to the same transaction or the same occurrences. And his exceptions were allowed.

The defendant was then arraigned and pleaded that he was not guilty. The court then assigned December 14, 1896, as the day for the trial.

On the said 14th day of December, before any proceeding towards empanelling a jury to try this indictment, the United States district attorney informed the court and the defendant that the Government entered a nolle prosequi to the third, fourth, fifth, and sixth counts in the indictment, the same being all the counts charging the murder of

Laura A. Nash, and would proceed only on the first and second counts, charging the murder of Captain Charles I. Nash, and the attorney had duly indorsed the said nolle prosequi on the indictment.

Then followed proceedings to empanel a jury for the trial.

On September 26, 1896, before the beginning of the October term of this court, the court ordered that venires issue for twenty-three grand jurors and for fifty-one petit jurors, to attend and serve at the term of said court to be begun and held on the 15th day of October, 1896.

On the 17th day of November, 1896, an order was made by the court as follows:

76 "Ordered, that venires issue for one hundred additional petit jurors, to come in on Monday, the fourteenth day of December next, at ten o'clock a. m., from the several cities and towns named in Table No. 50, and apportioned as follows, namely: Boston, sixteen; Adams, nine; Cambridge, fourteen; Woburn, thirteen; Nantucket, nine; Hyde Park, nine; Chatham, nine; Stoneham, nine; West Newbury, nine; Plainfield, three."

The venire for such additional jurors from Cambridge failed to be served and no additional jurors were summoned from the city of Cambridge, nor attended on the 14th day of December, but the two jurors from the city of Cambridge already in attendance on the court pursuant to the venires issued on the order of September 26, 1896, were included in the array of jurors on said 14th day of December, which had been assigned for the trial. In the same way certain other jurors summoned and in attendance under the order of September 26 made part of the array on December 14, 1896.

Before the empanelling of the jury for his trial the defendant filed the following challenge to the array:

77 [Caption omitted.]

Challenge to the array and especially to the persons substituted for the jurors ordered to be drawn from Cambridge.

And now comes Thomas M. Bram, the defendant named in said indictment, in his proper person, when the jury is about to be empanelled to try the issue in said indictment, and says that the said array is an illegal one, and that the order of this honorable court in reference to the drawing and apportioning of jurors for the trial of this case from different cities and towns in the district of this court in accordance with the provisions of section 802 of the Revised Statutes of the United States has not been compiled with, but has been evaded.

That at a session of this court on the 14th day of November, 1896, the district attorney for the United States for said district moved, in the presence of the defendant, in open court, that a special panel consisting of one hundred jurors be drawn, from which jurors were to be selected to try the defendant of the offence charged in said indictment. That the defendant, by his counsel, in open court assented to the said motion of the district attorney. Thereupon, on the 17th day of November, 1896, it was ordered by the court that venires issue for one hundred additional jurors to come in on Monday, the 14th day of December, 1896, at 10

o'clock in the forenoon, from the several cities and towns named in Table No. 50, and apportioned as follows, viz:

Boston, sixteen; Adams, nine; Cambridge, fourteen; Woburn, thirteen; Nantucket, nine; Hyde Park, nine; Chatham, nine; Stone-
78 ham, nine; West Newbury, nine; Plainfield, three.

That the defendant expected that this order of the court would be complied with. That he is advised it was his right, and he desired, and still desires, to be tried by a jury drawn pursuant to that order. That it now appears by the list of jurors presented to the defendant that the apportionment materially differs from said order of the court, and that by said present list the jurors are unjustly and against the interest of the defendant apportioned, as follows, viz:

Boston, seventeen; Adams, eleven; Cambridge, two; Woburn, twelve; Nantucket, nine; Hyde Park, nine; Chatham, eleven; Stoneham, ten; West Newbury, twelve; Plainfield, four.

That the apportionment on said list now before the defendant is contrary to the order of this court and in violation of section 802 of said Revised Statutes.

1st. Because no jurors were drawn from the city of Cambridge under said order of this honorable court of November 17th, 1896. That a larger number of jurors appears upon the list now before the defendant from the towns of Chatham, West Newbury, Plainfield, Stoneham, and Adams than was stated or authorized in said order of November 17th.

2nd. Because the following-named persons upon said list, to wit: Solomon C. Atwood, Theophile Brodeur, Martin Best, T. Weston Bryant, George O. Baird, Elijah Ball, Oliver J. Briggs, James N. Benjamin, James Buckley, Albert Brown, Oliver E. Eldridge, Nelson A. Newhall,
Parker H. Nason, and Arthur A. Norcross have been summoned
79 and have discharged duties as jurors in this court within less than one year of the time assigned for the trial of the defendant, and were not drawn or summoned to attend this special sitting of this court pursuant to said order of November 17th, 1896.

3rd. Because the fourteen jurors last named were without right and without the knowledge or consent of the defendant substituted for the fourteen persons which this court by its order of November 17th ordered to have drawn and returned from the city of Cambridge, and the defendant now objects to such substitution as a violation of his legal rights.

4th. Because the list of jurors now presented to the defendant contains the names of persons not residing within the several cities and towns named in Table No. 50, and in said order of this court, dated November 17th, 1896.

5th. That a meeting of the board of aldermen of said city of Cambridge was called for Monday, the 7th day of this month, for the purpose of drawing jurors pursuant to said order of this court. That on said 7th day of December, after notice had issued for said meeting of the board of aldermen of said Cambridge, and before the arrival of the hour for which said meeting had been called, an official of the United States notified the clerk of said city of Cambridge that it would not be necessary to hold said meeting, as no jurors would be needed from said Cambridge, and consequently none were drawn from that city.

6th. Because the venires on which said jurors were drawn were not properly served or by persons qualified to serve the same.

80 All the foregoing the defendant is ready to verify.

And so the defendant says that the persons named in said list do not constitute a legal jury; that the order of this court was not complied with; that the jurors are not apportioned in such a manner as to be just to the defendant; and this he is ready to verify.

THOMAS M. BRAM.

In support of said challenge to the array the defendant called attention to the aforesaid order of November 17th that venires should issue for additional jurors. His counsel also stated that no other order relating to the jurors had since been issued, except the following order, made by Judge Aldrich at a time when the defendant was not present, and had no knowledge that the order related in any way to this indictment or to his trial:

"Ordered, that jurors now present, not in case No. 473, be excused until Monday, December 14, 1896, at ten o'clock a. m., namely: Solomon C. Atwood, Theophile Brodeur, Martin Best, T. Weston Bryant, George O. Baird, Elijah Ball, Oliver J. Briggs, James N. Benjamin, James Buckley, Albert Brown, Oliver E. Eldridge, Nelson A. Newhall, Parker H. Nason, and Arthur A. Norcross."

The defendant further introduced the following affidavit of Edward J. Brandon:

81 "I, Edward J. Brandon, of the city of Cambridge, in the Commonwealth of Massachusetts, of lawful age, on oath depose and say: That I am, and was on the 7th day of December, 1896, clerk of said city of Cambridge; that on said 7th of December instant I was called to the telephone by a gentleman who gave his name as Mr. Sherman Hoar, United States attorney for said district, and who asked me if jurors had been drawn to serve in said court. I replied that no venire had been received. Mr. Hoar said that a venire had been sent November 23rd last, to which I answered that I had not received it. Later in the same day I was called to the telephone by a person claiming to be Henry W. Swift, esquire, United States marshal for said district, who inquired as to the drawing of said jurors, and I said to him also that no venire had been received. Mr. Swift thereupon said that a venire would be sent to Cambridge by two o'clock that day, and at his (Mr. Swift's) request an extra session of the board of aldermen of said Cambridge was called to meet at four o'clock of the same day for the purpose of drawing jurors. Later in the day a message came to the city messenger by telephone, purporting to be from Mr. Swift, that no venire would be sent to Cambridge and that no jurors need be drawn.

"The notice for said proposed meeting of the aldermen was thereupon countermanded.

"All the foregoing conversations and messages were substantially in the language herein used.

"EDWARD J. BRANDON."

This affidavit was duly sworn to.

82 It appeared that the grand venire issued under the above-named order of the court bore the following return:

"Grand venire, United States of America, district of Massachusetts, Boston, December , 1896. In obedience to the within precept I have caused eighty-six good and lawful men to be summoned to serve as petit jurors, to come before the October term, 1896, of the circuit court, now holden, mentioned in the nine venires committed to me at the same time with this precept for distribution, and the names of the persons returned to me by virtue of said venires are herewith returned to court. The venire for Cambridge was not served.

"HENRY W. SWIFT,
"*United States Marshal.*"

The defendant also called the attention of the court to section 803 of the Revised Statutes, and to the fact that from inspection of all the subordinate venires in the case it appeared that they were all served by constables of the respective towns, and not by the marshal or any of his deputies, nor by any person designated in section 803 of the Revised Statutes.

The Government in opposition to the challenge introduced another affidavit of Edward J. Brandon, as follows:

"I, Edward J. Brandon, clerk of the city of Cambridge, hereby certify that no venire from the circuit court of the United States, dated Nov. 17, 1896, for the choosing and appointing of fourteen jurors from Cambridge to appear in said court on Dec. 14th, 1896, has been served upon me as clerk of the said city, and that no venire whatever for the sum-
83 moning of jurors for the said court has been served on or since the aforesaid 14th of December.

"Attest:

"EDWARD J. BRANDON."

It appears from the return of the venire issued for the summoning of jurors from Cambridge that the constable to whom it was delivered did not serve the venire upon the city clerk, but undertook to select jurors himself.

It appeared from the record that with the jurymen previously summoned, and in attendance on the court, there were more jurymen present from certain towns than had been ordered in the order of November 17 for the issue of venires.

The attorney for the Government filed a replication to the challenge as follows:

[Caption omitted.]

Replication to the challenge to the array.

And thereupon Sherman Hoar, attorney for the United States of America for the district of Massachusetts, who prosecutes for said United States of America in this behalf, says that by reason of anything in said pleading by Thomas Bram alias alleged, the said United States of America ought not to be precluded from prosecuting said indictment against the said Thomas Bram alias, because he says:

First. That said jury was impartially drawn according to the laws of said United States of America.

Second. That said jury was not selected by design, but was
84 drawn impartially, as aforesaid.

Third. That a larger number of jurors does not appear upon the list before the defendant from the towns of Chatham, West Newbury, Plainfield, Stoneham, and Adams than was stated and authorized to be drawn from said towns by orders of this honorable court.

Fourth. That the jurors specially named in the list in specification two in the defendant's challenge to the array were regularly summoned as jurors in this court for the present October term therof, and are liable for service, and are now attending said term of court, and not engaged in any other trial, and are properly liable to be called as jurors for the trial of said defendant.

Fifth. That the fourteen jurors above-mentioned have not been substituted for any other fourteen persons which this honorable court by its order of November 17th ordered to have drawn and returned from the city of Cambridge.

Sixth. That the list of jurors now presented to the defendant contains no names of persons not residing within the several cities and towns named in Table No. 50.

And this the said Sherman Hoar is ready to verify. Wherefore he prays judgment, and that the said Thomas Bram may be required to go before said jury.

SHERMAN HOAR,
U. S. Attorney.

85 The court held that the challenge must be tried by the court, and found that the objection to the apportionment of jurors as contrary to the order of court and in violation of section 802 of the Revised Statutes was not well taken. The court also found that the marshal, pursuant to a grand venire issued on the 26th day of September, 1896, summoned a number of jurors; that those jurors attended, and continued in attendance, and were in attendance on the 14th of November, on which date the order for additional jurors was issued; that said jurors were a part in fact and in law of the regularly summoned jurors to attend and do jury service at this current term of the court; that their presence at this time to make up the number from which a jury may be empanelled is in no sense a substitution for anybody else, and that they are as regularly summoned and attending as those who have been summoned pursuant to the venires ordered on the 17th day of November. With respect to the jurors alleged to have served and discharged duties as jurors within less than one year of the time assigned for the trial of the defendant, the court ruled that said jurors had been drawn to attend this term of said court and were still in attendance upon it. The fourth ground of challenge was waived by the defendant so far as concerned the challenge to the array. Upon the fifth ground of challenge the court ruled that "The neglect of the constable of Cambridge, to whom was committed the venire regularly issued under the seal of this court, was no ground for challenging the array." The court overruled the sixth objection, and ruled that the venires had been prop-
86 erly served, except that which ran to Cambridge, that the challenge to the array could not be supported, and that the jurors had been

legally and properly drawn, summoned, and returned, and were fit to be empanelled to try the case.

To all the foregoing rulings the defendant seasonably excepted, and his exceptions were allowed.

Upon the examination of Juror Solomon C. Atwood upon the voir dire, the juror testified that he was one of the jurors who had been summoned for the regular term of said court and was still in attendance. The juror was then challenged for the cause that he was not one of those who had been summoned upon the special venires for additional jurors, but was one summoned earlier in the term and had rendered service at an earlier part of the term. It was proved that this juror had not been excused, but was still in attendance. The challenge for cause was overruled and disallowed. Exception was taken and allowed to this ruling.

This juror was then peremptorily challenged.

The Juror Martin Best was challenged for cause, with the facts relating to him precisely the same as those relating to Solomon C. Atwood, and this challenge for cause was likewise overruled and disallowed. The defendant excepted and his exception was allowed.

The juror was then challenged peremptorily.

When the panel was complete, it appeared that the defendant had not exhausted all his peremptory challenges.

87 Robert N. Leahan, a witness called for the prosecution, testified that he boarded the "Herbert Fuller," Tuesday morning, July 21, 1896, in the port of Halifax; that he went into the after cabin and observed the doors.

He was asked by the prosecution: "Will you describe how you found the door between the room marked 'Passenger' and the room to the rear of it there?" [The diagram of the vessel was shown to the witness.] Whereupon the following occurred:

Ans. Do you mean the captain's room or his wife's room?

DEFENDANT'S ATTORNEY. I wished to object before that answer.

DISTRICT ATTORNEY. Do not answer until it is ruled upon. Look at that plan, please.

WITNESS. Which is the cabin?

DISTRICT ATTORNEY. Look at the room marked 'Passenger.' Now, did you observe the condition or the position of the door between that room and this room here? [Indicating.]

WITNESS. Mrs. Nash's room?

ATTORNEY. Mrs. Nash's room.

WITNESS. Yes, sir; it was locked.

DEFENDANT'S ATTORNEY. I wished to object, but now that he has answered, I do not know that I can.

COLT, J. We think the question is admissible.

WEBB, J. It has already appeared in evidence that very soon after this transaction aboard the ship the cabin was locked up and kept locked, and your client had the key.

88 DEFENDANT'S ATTORNEY. What the condition was a week or nine or ten days afterwards—well; as it is, the witness having answered it, my exception is saved.

WEBB, J. You gave proper notice. The court has not ruled. It rules upon your suggestion to strike the answer out. We understand you to ask to have that answer stricken out.

DEFENDANT'S ATTORNEY. Yes, your honor.

WEBB, J. Because it was answered pending your objection, the motion to strike out is denied, and your exception is allowed.

Further questions as to other doors were asked the witness and were excluded, and the court ruled as follows:

COLT, J. The court, upon the whole, is of the opinion that proper foundation for this class of evidence has not been laid.

WEBB, J. The Government has not undertaken to show after these doors were locked on the morning after the murder—the cabin was closed and the keys given to Bram—whether there was any opening again until they arrived at Halifax, nor after the arrival at Halifax how soon the inspector of police, or whatever his title is, came on board—the chief of police came on board, and when they were first unlocked. Had that been done, this evidence we believe admissible. But in the absence of evidence of that sort, evidence on that point, we on the whole conclude that this present examination can not be justified, and also that our ruling with regard to the door between the passenger's and Mrs. Nash's room was mistaken and should be reversed, and the
89 jury instructed to disregard the statement of this witness that he found the door locked.

This was all said in the presence and hearing of the jury, but they were not otherwise instructed on the point.

Nicholas Power, of Halifax, called by the Government, testified that he was connected with the police department of Halifax, and had been for thirty-two years, and for the last fifteen years of that time as a detective officer; that after the arrival of the "Herbert Fuller" at Halifax, in consequence of a conversation with Charles Brown, he made an examination of Bram, the defendant, in the witness's office in the city hall at Halifax, when no one was present besides Bram and the witness. The witness testified that no threats were made in anyway to Bram, nor any inducements held out to him.

The witness was then asked:

"What did you say to him and he to you?"

To this the defendant's counsel objected. The defendant's counsel was permitted to cross-examine the witness before the court ruled upon the objection, and the witness stated that the conversation took place in his office, where he had caused the defendant, Bram, to be brought by a police officer; that up to that time the defendant had been in the custody of the police authorities of Halifax, in the custody of the superintendent of police, John O. Sullivan; that the witness asked that the defendant should be brought to his office for the purpose of interviewing him; that at his office he stripped the defendant and examined his clothing, but not his pockets; that he told the defendant to submit to an examination, and that he searched him; that the defendant
90 was then in custody and did everything the witness directed him to do; that the witness was then a police officer acting in his official capacity; that all this took place before the defendant had been examined before the United States consul, and that the witness did not

know that the local authorities had at that time taken any action, but that the defendant was held for the United States—for the consul-general of the United States.

The witness answered questions by the court as follows:

Q. You say there was no inducement to him in the way of promise or expectation of advantage?

A. Not any, your honor.

Q. Held out?

A. Not any, your honor.

Q. Nor anything said, in the way of suggestion to him that he might suffer if he did not—that it might be worse for him?

A. No, sir; not any.

Q. So far as you were concerned it was entirely voluntary?

A. Voluntary, indeed.

Q. No influence on your part exerted to persuade him one way or the other?

A. None whatever, sir; none whatever.

The defendant then renewed his objection to the question, what conversation had taken place between Bram and the witness, for the following reasons: That at the time the defendant was in the custody of the chief of police at Halifax; that the witness in an official capacity
91 directed the police authorities to bring the defendant as a prisoner to his private office and there proceeded to take extraordinary liberties with him; he stripped him; the defendant understood that he was a prisoner, and he obeyed every order and direction that the witness gave. Under these circumstances the counsel submitted that no statement made by the defendant while so held in custody and his rights interfered with to the extent described was a free and voluntary statement, and no statement as made by him bearing upon this issue was competent.

The objection was overruled, and the defendant excepted on all the grounds above stated, and the exceptions were allowed.

The witness answered as follows:

"When Mr. Bram came into my office, I said to him: 'Bram, we are trying to unravel this horrible mystery.' I said: 'Your position is rather an awkward one. I have had Brown in this office and he made a statement that he saw you do the murder.' He said: 'He could not have seen me; where was he?' I said: 'He states he was at the wheel.' 'Well,' he said, 'he could not see me from there.' I said: 'Now, look here, Bram, I am satisfied that you killed the captain from all I have heard from Mr. Brown. But,' I said, 'some of us here think you could not have done all that crime alone. If you had an accomplice, you should say so, and not have the blame of this horrible crime on your own shoulders.' He said: 'Well, I think, and many others on board the ship think, that Brown is the murderer; but I don't know anything about it.' He was rather short in his replies."

92 Q. Anything further said by either of you?

A. No; there was nothing further said on that occasion.

The direct examination of this witness was limited to the interview between the witness and the defendant, Bram.

On cross-examination of the witness Power, he testified that at the time of the above-stated examination he took possession of a pair of sus-

penders belonging to the defendant, and kept the same in his office until the prisoners were coming to Boston—the whole crew and the passenger were imprisoned at Halifax, and sent as prisoners to Boston—when he handed them over to the Halifax superintendent of police, and they were sent to Boston, with other property of the defendant.

Defendant's counsel, upon the ground of showing interest on the part of the witness, then asked: "What other articles belonging to the defendant did you take possession of at that time?"

This line of inquiry was objected to by the district attorney on the ground that the matter was not opened on the direct examination, and the defendant could call the witness as part of his case if he saw fit. The court excluded the inquiry, ruling that it was not proper cross-examination and did not tend to show interest, and the defendant duly excepted and the exception was allowed.

There was evidence tending to show that Captain Nash, his wife, and the second mate were all murdered on the morning of July 14, between midnight and about 2 a. m., and that for hours before and after
93 their commission the barkentine "Herbert Fuller" was sailing on the starboard tack and under full sail; the wind was about two points abaft the beam, on the starboard quarter; that the sheets, especially the spanker sheets, were eased well off, and that the vessel was sailing at the rate of six or seven knots an hour.

Oscar Anderson, called by the Government, testified that he was an able seaman on board the "Herbert Fuller," a native of Sweden, twenty-five years old, and had followed the sea for a living since he was fourteen years old. He also testified that he had the wheel of the vessel from 4 to 6 o'clock of the afternoon before the murders, and was in the second mate's watch; and that "the vessel steered good, but you had to keep a sharp lookout; she was very quick on the wheel;" that he steered her. He was asked by the district attorney:

"If the vessel is on the starboard tack and under full sail, and the sheet is eased off, and the wind coming a point or two aft on the starboard quarter, and you take your hand off the wheel, what would happen to her?"

Defendant objected to the question on the ground that the witness was not qualified as an expert.

In response to questions by defendant's counsel he said that he had never left the wheel; that he never lashed the wheel, and that he did not know any more about the wheel of the "Herbert Fuller" than what he noticed when he was at it; that he never made any particular study of the wheel nor of the movements of the vessel.

In reply to questions by the court he said that he had stood his regular tricks at the wheel from the time of leaving Boston; that
94 he had steered the vessel a good many times under the conditions named in the question; that he sometimes had taken his hands off the wheel just for a moment; that if you leave the wheel for a moment the vessel would keep off or come up in the wind.

The court then admitted him to answer the question, overruling the objection, and the defendant excepted and his exception was allowed. The question being repeated the witness answered: "The vessel would either keep off or go in the wind."

Frank Loheac, called by the Government, testified that he was a native of France, twenty-five years of age, and had been at sea for eleven or twelve years; that he shipped on the "Herbert Fuller" July 3, 1896, and was in the first mate's watch; that he had the wheel just after the murder, from a little after 2 a. m. till 4 a. m.; that he steered the vessel once every day and once every night.

He was asked: "How did that vessel steer?" and answered: "She was pretty quick on her wheel."

To the question, "To keep her on her course, what did you have to do if you were at the wheel?" he answered: "You had to watch her sharp."

He was then asked: "If you were steering that vessel when she was sailing in a six or seven knot breeze, and she was under full sail on the starboard tack, with the sheets free and the wind coming a point or two aft on the starboard quarter, what effect would it have on the vessel? What would the vessel do if you took your hands off the wheel?"

95 The defendant objected, on the ground that there were not sufficient elements stated in the hypothetical question, and also upon the ground that it was not open to the Government at this stage of the proceedings to support their direct testimony by a hypothetical question. The objection was overruled and the question admitted, and the defendant excepted and the exception was allowed.

The witness answered: "She would either fall off or come to the wind, sir."

Henry J. Slice, called by the Government, an able seaman on the "Herbert Fuller," born in Germany, who had been going to sea sixteen years, and had shipped on this vessel July 3, 1896, and was in the second mate's watch, testified that on Monday night before the murders he was at the wheel from eight to ten o'clock; that the vessel "steered pretty fair;" that "she steered very fast;" that her wheel was a right-handed wheel and worked easy; that she had a lee helm; that with the sails up, if left alone at the wheel, she would come up to the wind.

He was then asked: "When the 'Herbert Fuller' was sailing with sheet well off, and all sails set, with the wind on the starboard quarter about two points abaft the beam on the starboard tack, what would be the effect on that vessel if you took your hands off that wheel?"

The same objection and upon the same grounds as made with regard to the testimony of Loheac was made to this question by defendant's counsel. The objection was overruled, and exception taken and allowed.

The witness answered: "She would come up to the wind, sir."

96 Hendrick Perdok, a Government witness, twenty-two years old, born in Holland, and who had been to sea for the last ten years, and who was one of the crew of this vessel in the capacity of ordinary seaman, and in the first mate's watch, and had been at the wheel from six to eight o'clock on the night of the murders, testified that he took his regular turn at the wheel; that "the wheel worked quite good;" that the wheel worked easy enough; that the vessel "steered good, so long as you looked all the time, but you must look out all the time, but you looked at the compass all the time and you could steer good."

He was then asked: "When the 'Herbert Fuller' was sailing, say, six or seven knots an hour, with the wind on the starboard quarter a

couple of points abaft the beam, and with the sheet of the spanker boom free, and all the sails on her set, what effect would it have on her if you took your hands off that wheel?"

To this question the same objections and exception were made as in the case of the preceding members of the crew, but it was admitted and defendant's exception was allowed.

The witness answered: "You take it off and the spanker must come over at the same time; if you took your hands off, the vessel would fall off and the spanker would want to go over to the leeward side—right over, if it stayed that way. If it was over on the port side, it would go over to starboard."

He was also asked: "Now, what effect would it have on that vessel under these conditions if you lashed that wheel?"

The same objections, and for the same reasons, were made to this question and were overruled.

97 Exception was taken and allowed.

The witness answered: "Just the same."

Q. "And when you were sailing under these conditions, how did you have to move that wheel?"

A. "Have to move it at all times a small bit."

Folke Wassen, a Government witness, one of the crew, in the capacity of ordinary seaman, a native of Sweden, age twenty-one years, and who had been following the sea for a living since 1893, was in the second mate's watch. He testified that he had the wheel from 10 p. m. to 12 midnight on Monday just previous to the murder, and that the ship steered very quickly.

He was asked: "Suppose the 'Herbert Fuller' was sailing the high seas at the rate of seven knots an hour, with the wind abaft the beam, on the starboard quarter, with the vessel on the starboard tack, with all sails set and the spanker sheet free, what effect would it have if you took your hands off that wheel?"

This question, under the same objections as before, was admitted, and exception saved and allowed.

The witness answered: "She would come up to the wind or keep off."

The defendant contended that said Charles Brown had equal opportunity with the defendant to commit said crimes. In support of this contention, the defendant introduced evidence tending to show that under the conditions existing at the time of the murders it would have

98 been possible for said Brown to have left the wheel lashed for a sufficiently long period to have enabled him to commit the murders.

The Government introduced evidence tending to show that Captain Nash was killed by a person standing over him, by his side, and about opposite his hip, and that this person struck him several blows on the head with an axe, which severed some of the arteries, and that the other persons killed bore wounds of a similar character to those of the captain.

Frank Winthrop Draper, a Government witness, for thirteen years a visiting physician of the Boston City Hospital; since 1878 had been teaching legal medicine in the Harvard Medical School, and since 1889 a professor of that department, and who in 1877 was appointed medical

examiner for Suffolk County, and as such had examined 4,680 cases, of which 1,022 had been autopsies, in response to a question by the district attorney as to the probable direction in which blood would flow or spout in case of a wound inflicted upon the head and severing the arteries, he testified that if the arteries were divided the direction from which a cut enters one of those arteries makes no difference as to the direction in which the blood will spurt from it, and that the blood would spurt in the direction from which it comes from the heart, namely, towards the arteries, or, in the head, towards the top of the head.

The witness was then asked, in substance: Whether, in your opinion, a man standing at the hip of a recumbent person and striking
99 blows on that person's head and forehead with an axe, would necessarily be spattered with or covered with some of the blood?

The defendant objected to the question and it was admitted and exception to its admission was allowed.

The answer was: "My answer is that, under the conditions framed in the question, the assailant in such a case would not necessarily receive blood spots upon his person or clothing."

THOMAS M. BRAM, the defendant, a witness at his own request, and in his own behalf, was sworn and testified.

The defendant on his direct examination was shown a book and testified in regard to it as follows:

Q. What is that book?

A. It is called a log book; it is a daily journal.

Q. Who kept that book or made the entries upon it?

A. This book is kept by the mate.

Q. You may look it through and see whether all the entries were made by you?

A. Yes, sir; all are in my handwriting.

Q. Are there any entries upon that book after you were put in irons?

A. Yes, sir; there was some notation made on the following days, a couple of days after that. I didn't pay much attention to the log book after we started on our way to Halifax. I brought the vessel here on the chart and there wasn't anything strange occurred, and of course I neglected it in making notations daily of what little there was.

100 Q. You say you find there were entries made after you were put in irons?

A. Oh, no, sir; not after I was put in irons. No, sir; there ain't nothing here.

Q. Well, are all the entries you find, all the writing upon that book, in your handwriting? I mean beginning, of course, with the time the vessel left Boston Harbor, when the entries were made?

A. Yes, sir.

Q. It is said to be on the 8th of July?

WEBB, J. The 3rd of July, isn't it?

DEFENDANT'S COUNSEL. The 8th day of July, when they sailed from Nantasket Roads, your honor.

WEBB, J. Well, his log began when he pulled out from port.

DEFENDANT'S COUNSEL. However that may be, I am not aware that there is any dispute about it.

Q. When did you begin to make entries?

A. I began to make entries on the morning of the 10th—the 10th of June, when I went aboard the vessel first.

Q. (By WEBB, J.) The 10th of June?

A. Yes, sir; I kept the diary of each day's work.

Q. (By DEFENDANT'S COUNSEL.) The first entry made by you, we understand, was on the 10th day of June?

A. Yes, sir; the day I went aboard.

Q. Now, between the 10th of June and the time you were put
101 in irons, do you find any entry—any entry made by any other person?

A. No, sir; nothing here visible.

Q. I wish you to state to the court and jury how that log book was kept.

A. This log book is a daily journal. The mate in charge of that ship is supposed to make a notation of all the things comes under his observation during the day's course, 24 hours; that is, of any importance. On this class of vessels—coasting vessels—we are not at all particular.

DISTRICT ATTORNEY. If your honors please——

COURT. That should be excluded.

DISTRICT ATTORNEY. I think he had better confine himself to how he kept that log.

WEBB, J. In the first place this vessel was bound on a foreign voyage.

Q. (By DEFENDANT'S COUNSEL.) You may speak about this particular book and how it was kept.

A. Well, this book—it is not correct; it is not supposed to be correct. It is only dead-reckoning—that is, the figuring part of it is only dead-reckoning, and dead-reckoning is only guesswork.

Q. I was going to ask you what you meant by dead-reckoning?

A. Well, dead-reckoning is a method used in navigating a vessel without observation of sun, moon, stars, or planet. It is guesswork.

102 Q. What is the other kind of reckoning than dead-reckoning?

A. The other—the other system for navigating a vessel—is navigation; different problems in navigation, which you are aided by a chronometer to find the longitude of the ship. We use the clock in working up stars' altitude, such as the north star, Aldebaran, or some other star. We generally take the time off the clock. But on this Herbert Fuller we hadn't these facilities for navigating a vessel. The captain had full control of the chronometer and up to the time of this murder we had, I think, two observations that was not to be relied upon, on account of the horizon being very hazy. The altitudes we took of the sun could not be relied upon.

Q. Why not?

A. For the simple reason that there was too much obstruction. We had not clear view of the level of the sea when we brought the sun down. There was too much haze along the horizon, and these positions that I made note here, on this log book, is only imaginary ones.

Q. What was the purpose of taking them?

A. Well, we are supposed to keep a daily run of the vessel as near as possible. I am not as accurate as I might have been on the log book

part. This is—the most important part of this log book is when any damage occurs to the vessel we are aboard of.

Q. What do you do in the event or case of damage occurring to the vessel?

103 A. Well, the captain generally inspects the log book on such occasions to see whether the language used in the log book is strong enough to test an insurance case protecting the owners of the vessel. If it is not, of course we generally fix it up to suit the captain's experience in regards to the circumstances.

Q. Now you may open the book. Do you find two loose leaves?

A. I do, sir.

Q. You may explain those.

A. On Saturday after the murder all probabilities were that we would get into Halifax by Sunday night. This was the Saturday before we got into Halifax. We got in on Tuesday. On Saturday before we got into Halifax the thought came to me, "We may be sent home to New York"—to Boston.

The COURT. State what you did.

A. I started to make duplicates of the occurrence from the 13th, "For the vessel may go away with the log book, and we won't have anything to guide by." Then realizing the nominal price of the log book, I discontinued the writing. That is why the leaves—probably two dates are together the same way here.

WEBB, J. He began to make duplicates?

WITNESS. Duplicates; yes, sir.

WEBB, J. And stopped it after a while?

WITNESS. And stopped it; yes, sir.

Q. Were you then in irons?

104 A. No, sir; this was on Saturday. I was put in irons on Sunday—Sunday about noon time.

WEBB, J. You say your dead-reckoning is all guesswork. Didn't you have something to guess by?

A. I took my reckoning on the speed of the vessel. I took the courses she was on.

Q. The courses she had been sailing?

A. Yes, sir.

Q. And the length of time she steered the several courses?

A. Yes, sir.

Q. You had some memorandum of that?

A. No, sir; I didn't keep a slate.

Q. You did it from memory?

A. Yes, sir.

Q. Did you or not, in order to get the reckoning, take into consideration the speed at which she was going and how long she had been on each course?

A. No, sir; I did not carefully do that. I kind of guessed the time of the different courses we sailed.

Q. Do you mean to say you navigated that ship by pure guesswork?

A. Not after the murder.

105 Q. No; I mean before.

A. Of course it was not all guess. Of course I used my experience with the ship, and so forth.

Q. You entered on the log book of the ship what you estimated the reckoning to be?

A. Yes, sir.

Q. Tell me the latitude and longitude of the ship the day before the murder?

A. The latitude and longitude—the figures is wrong here from what it was in the chart. The latitude 36 north on the morning of the 14th.

Q. What was it on the 13th? Don't take those loose sheets—take the fixed.

A. The 13th, 36° 07′—36° and 7 miles north, and the longitude 53° 25′ west.

Q. Did your log show that by dead-reckoning or by observation?

A. By dead-reckoning.

Q. You enter when the position is determined by dead-reckoning and when by observation?

A. Yes, sir; we do—we generally do; yes, sir.

Q. Now, what was it the next day?

A. On the 14th it was 38° 10′ north and 53° 14′ west. The wind headed us off this day. We only lay up about north-northwest on this course for Halifax.

Q. Were those positions as correct as you could make it by the
106 method you had of determining your position? You say they are wrong. How do you know that?

A. They are not right.

Q. Not exact, you mean?

A. Yes, sir.

Q. But they were approximately correct?

A. Yes, sir; they were to me.

On cross-examination the defendant testified in regard to the log book and to what has been spoken of as duplicates, thus:

Q. (By ONE OF THE COURT.) How did you get the information necessary to enter in your log what happened on deck while the second mate had command and you were below?

A. Well, I am sorry to say that we was not particular about making errors.

Q. That is not the question I asked you. I asked you where you got your information which enabled you to enter upon your log book what took place on board your ship when you were below and the second mate had command of the deck?

A. None whatever, sir; there were none.

Q. Is your log book presumed to cover any of the time when the second mate had command of the deck and you were below?

A. No, sir.

Q. (By DISTRICT ATTORNEY.) Mr. Braun, why did you make that duplicate of the log book?

A. I started, as I told you, to make duplicates of all of them.
107 Q. Of all of what?

A. All of the occurrence; but realizing the nominal price of the book, I stopped it.

Journal from Copy of Log Book Boston towards Buenos Ayres

H	K	F	COURSES.	WINDS.		LEEWAY.	THERMOMETER.		BAROMETER.	REMARKS.
				Intervals	Points		Air	Water		Wednesday 1st of July 1896
1										
2			E b S	South						At 4 A.M. hove short and at 6
3										A.M. took tug and towed out
4										at 7.30 A.M. Boston light
5										Ships bore about from which
6	5									I take my Departure
7	5									
8	5									Pumps well attended
9	5									Lights looked after
10	5									
11	5									
12	5									
1										
2										
3										
4										
5										
6										
7										
8										
9										
10										
11										
12										

Course	Distance	Diff. of Lat.	Departure	Lat. by D. R.	Lat. by Obs.	Variation	Diff. of Lon.	Lon. by [illegible]	Lon. by Obs.
E by S	35	3	30	42.17		13°	27	70.18	

H	K	F	COURSES.	WINDS.		LEEWAY.	THERMOMETER.		BAROMETER.	REMARKS.
				Intervals	Points		Air	Water		Thursday 2nd of July 1896
1										
2			E b S							
3				S W						This day comes in with light
4										S W wind and head seas
5										
6										at 8.30 P.M. Eryholands
7			S E							light bore W b N Dist 18 miles
8										
9										
10				S W						Pumps well attended
11										
12										
1										
2										
3										
4										
5										
6				S W						
7			S S E							
8										
9										
10										
11										
12										

Course	Distance	Diff. of Lat.	Departure	Lat. by D. R.	Lat. by Obs.	Variation	Diff. of Lon.	Lon. by [illegible]	Lon. by Obs.
S 43° E	120	69	76	41.43	41.50	13	97	68.75	68.42

15079

Journal from Copy of Log Book Boston towards Buenos Ayres

H	K	F	COURSES.	WINDS. Direction.	WINDS. Force	LEEWAY.	THERMOMETER. Air	THERMOMETER. Water	BAROMETER.	REMARKS.
										Saturday 10th day of July 1796
1	5									
2	5		SE							Thus day comes in with the
3	5									
4	5									foggy weather with moderate
5	5			SSW						
6	5									winds
7	5		SE							
8	5									At 8 AM took in all
9	6									
10	6									Small Sails at 7 AM
11	6									
12	6		SE							Sat all Sails
1	4			SSW						
2	4									Pumps well attented
3	4									
4	4									Lights looked after
5	4									
6	4									
7	4			SSW						
8	4									
9	6									
10	6									
11	6									
12	6		SE							

Course.	Distance	Diff. of Lat.	Departure.	Lat. by D. R.	Lat. by Ob.	Variation.	Dif. of Lon.	Lon. by D. R.	Lon. by Ob.
SE	130	86	86	40 24		14°	117	63 46	

H	K	F	COURSES.	WINDS. Direction.	WINDS. Force	LEEWAY.	THERMOMETER. Air	THERMOMETER. Water	BAROMETER.	REMARKS.
										Sunday 11th day of July 1796
1	7									
2	7		SE							Thus day comes in with mod
3	7			SW						
4	7									
5	7									winds and smooth seas
6	7									
7	7									
8	7									slitely overcast
9	7		SE							Pumps well attended
10	7			SW						
11	7									Light look out for
12	7									
1	7									
2	7									
3	7									
4	7									
5	7									
6	7			SW						
7	7		SE							
8	7									
9	7									
10	7									
11	7									
12	7									

Course.	Distance	Diff. of Lat.	Departure.	Lat. by D. R.	Lat. by Ob.	Variation.	Dif. of Lon.	Lon. by D. R.	Lon. by Ob.
ESE	179	79	160	39 10		11	180	63 16	

Journal from Copy of Log Book Boston towards Buenos Ayres

H	K	F	COURSES.	WINDS. Direction	WINDS. Force	LEEWAY.	THERMOMETER Air	THERMOMETER Water	BAROMETER	REMARKS. Saturday 13th July 1796
1	9									
2	9									
3	7		SE by E	W	4					This day comes in with
4	9									
5	9									fresh winds at 5 30 P M
6	9									took in Jib topsails and
7	9									
8	9									royal and mizen topsail
9	9									
10	9		SE by E							
11	9			W	4					Pumps well attended
12	9									
1	9									
2	9									
3	9									
4	9									
5	9									
6	9		ESE							
7	9									
8	9									
9	9			W by S	4					
10	9									
11	9									
12	9									

Course	Distance	Diff. of Lat.	Departure	Lat. by D. R.	Lat. by Ob.	Variation	Diff. of Lon.	Lon. by D. R.	Lon. by Ob.
	216	84	210	36 10	36 56	15	240	56 20	

H	K	F	COURSES.	WINDS. Direction	WINDS. Force	LEEWAY.	THERMOMETER Air	THERMOMETER Water	BAROMETER	REMARKS. Sunday 14th July 1796
1	8									
2	8									
3	8		SE by E	W	4					This day comes in with
4	8									
5	8									Variable winds but fare
6	8									
7	8									at 7 P M too
8	8									took in all fore and aft
9	8		SE by E							
10	8									Sails at 8 30 A M Set all
11	8			W by S	4					
12	8									Sails and wind increased
1	8									
2	8									from W to W
3	8									moderate all through this watch
4	8		S E							
5	8									Pumps well attended
6	8									
7	8									
8	8			W by S	4					
9	8									
10	8									
11	8									
12	8									

at about 2 or 3 P M

Course	Distance	Diff. of Lat.	Departure	Lat. by D. R.	Lat. by Ob.	Variation	Diff. of Lon.	Lon. by D. R.	Lon. by Ob.
S 72 E	232	73	180	36 57		16	226	53 25	

15081

Copy of Log Book

Journal from Boston towards Buenos Ayres

H	K	F	COURSES	WINDS		LEEWAY	THERMOMETER		BAROMETER	REMARKS
				Variations	Force		Air	Water		Wednesday the 15 day of July 1896
1										
2										
3										
4										
5										
6										
7										
8										
9										
10										
11										
12										
1										
2										
3										
4										
5										
6										
7										
8										
9										
10										
11										
12										

Courses | Distance | Diff. of Lat. | Departure | Lat. by D. R. | Lat. by Obs. | Variation | Diff. of Lon. | Lon. | Lon. by Ob.

39 20

H	K	F	COURSES	WINDS		LEEWAY	THERMOMETER		BAROMETER	REMARKS
				Variations	Force		Air	Water		Tuesday the day of July 1896
1										
2										
3										
4										
5										
6										
7										
8										
9										
10										
11										
12										
1										
2										
3										
4										
5										
6										
7										
8										
9										
10										
11										
12										

Courses | Distance | Diff. of Lat. | Departure | Lat. by D. R. | Lat. by Obs. | Variation | Diff. of Lon. | Lon. | Lon. by Ob.

38 10 | 33 12

On this day at 3 30 PM the steward of said H Fuller came to me and told me that the sailors all came and made an open statement to him in refrence to one of the sailor whos name is Charles Brown conduct of guilt in regards to the murder which took place on board said Vessel Sat once got each mans statement Then upon the strength of these statement we concluded to put him in Irons at day break at 7 PM all hands was mustard aft and throughly search and Stiff no other weapon was given them but their Knives each man was then placed seven distance apart from each other on the after house Myself the Steward & passenger was stationed armed ships well armed and Kept a good lookout untill day break At 5 AM Charles Brown was manded and put in Irons Now actions all night very suspicious and got himself all ready as it were to jump over the side but he was well guarded by all hands on board at 30 AM he made an effort to pull for the forward part of the ship but was instantly stop by the Steward upon a pointed revolver towards him

Moderate weather winds & seas

Thomas M Bram Master
Jonathan Spenser Steward
Peter Countryman Monks
" R Lyons
John Massene
Oscar Anderson
Henry Blair

Tuesday the day comes on with moderate winds and smooth seas and several times taking in and setting sails we then procured the bodys with tar and sowings and put them on the little boat and ships then written statement was taken and signed by members of the crew

At 8 A M then being the nearest port bearing about

S W by S 720 miles

15082

Journal from Boston Mass U.S. towards Buenos Ayres

Copy of Loose Sheets

H	K	F	COURSES	WINDS	LEEWAY	THERMOMETER Air	THERMOMETER Water	BAROMETER	REMARKS
1									Wednesday 7th July 1796
2									
3			Part of Eight Days work at Noon						At 4 A M have short and at
4									6 A M look tug and towed
5									
6	5		E b S	South					out at 7 30 A M Boston
7	5		"	"					light ship bore abeam from
8	5		"	"					which I take my departure
9	5		"	"					
10	5		"	"					
11	5		"	"					
12	5		"	"					
1									
2									
3									
4									
5									
6									
7									
8									
9									
10									
11									
12									

Course	Distance	Diff. of Lat.	Departure	Lat. by D. R.	Lat. by Obs.	Variation	Diff. of Lon.	Lon. [illegible]	Lon. by Obs.
E ½ S	35	3	30	42 17		13° 12' W	27	70 18	

H	K	F	COURSES	WINDS	LEEWAY	THERMOMETER Air	THERMOMETER Water	BAROMETER	REMARKS
1	4		E b S	S W					Thursday 8 July 1796
2	4		"	"					
3	4		"	"					This day comes on with light
4	4		"	"					
5	4		"	"					South west wind and head
6	4		"	"					sea at 8 30 P M Lands
7	4		S E						light bore W by N Dis 18 m
8	4		"	"					
9	4		"	"					
10	4		"	"					Pumps well attended
11	4		"	"					
12	4		"	"					
1	4		"	"					
2	4		"	"					
3	4		"	"					
4	4		S S E						
5	4								
6	4								
7	4								
8	4								
9	4								
10	4								
11	4								
12	4								

Course	Distance	Diff. of Lat.	Departure	Lat. by D. R.	Lat. by Obs.	Variation	Diff. of Lon.	Lon. [illegible]	Lon. by Obs.
S 45° E	98	69	69	41° 43'	41° 32'	13°	93	68 40	68 40

15083

Copy of Loose Sheets

Journal from Boston Bar to S. Edwards Buenos Ayres

H	K	F	COURSES	WINDS		LEEWAY	THERMOMETER		BAROMETER	REMARKS Thursday the 4th July 1816
				Direction	Force		Air	Water		
1	4									
2	4		SE	SW						
3	4									
4	4									This day comes on with dense
5	4									foggy weather with moderate
6	4									
7	4									breeze Pumps well attended
8	4			SW						
9	4									
10	4									and good lookout
11	4		SE							
12	5						1/2 62			at 8 30 PM took in
1	5									
2	6		1 2 3 3 4 8							Royal Jib topsail
3	5		1 2 3 8 3 8							
4	6			46						& Main topmast Stay
5	5									
6	5									Sail at 7 A M
7	5		SE							
8	5			SW						Sat all sails
9	6									
10	6									
11	6									
12	6									

Course	Distance	Diff. of Lat.	Departure	Lat. by D. R.	Lat. by Ob.	Variation	Diff. of Lon.	Lon. [illegible]	Lon. by Ob.
S 45° E	130	86	86	40° 24'	40° 24'	13	1.17	66 46	none

H	K	F	COURSES	WINDS		LEEWAY	THERMOMETER		BAROMETER	REMARKS Friday the 5th July 1816
				Direction	Force		Air	Water		
1	7					1/2 P				
2	7		SE							
3	7			SW						
4	7									
5	7									This day comes on with
6	7									
7	7		SE							moderate wind and mad
8	7									
9	7									head sea weather slightly
10	7			SW						
11	7									
12	7									overcast
1	7		84							
2	7		168							
3	7									
4	7									
5	7									
6	7		SE							
7	6			SW						
8	6									
9	6									
10	6									
11	6									
12	6									

Course	Distance	Diff. of Lat.	Departure	Lat. by D. R.	Lat. by Ob.	Variation	Diff. of Lon.	Lon. [illegible]	Lon. by Ob.
E SE 1/2 E	161	74	145	39 10	39 10	14°	180	63 46	none

15084

H	K	F	COURSES	WINDS	LEEWAY	THERMOMETER Air	THERMOMETER Water	BAROMETER	REMARKS
1	9								Saturday July 11 1896
2	9								
3	9		S S E		2 S E				Thus day comes in with
4	9								
5	9			W S W					mod breeze and mod seas
6	8								at 5-30 P M took in Jib
7	8								
5	9		E S E						top sail and and mizn
9	9								
10	8								topmast staysail moderate
11	9								
12	10								winds and rain squalls
1	10								
2	10			W					
3	8		E S E						
4	9								
5	8								
6	9								
7	8								
8	8								
9	7		E S E	W S W					
10	7								
11	9								
12	10								

Course	Distance	Diff. of Lat.	Departure	Lat. by D. R.	Lat. by Obs.	Variation	Diff. of Long.	Long.	Long. by Obs.
E by S	199	76	210	38 10	38 00	15	240	60 11	Same

H	K	F	COURSES	WINDS	LEEWAY	THERMOMETER Air	THERMOMETER Water	BAROMETER	REMARKS
1	8		S E by S	W S W					Sunday July 12th 1896
2	8								
3	8		"	"					Thus day comes in with light
4	8								
5	8		"	"					variable wind and much
6	8								
7	8		"						brook in all fore and aft
8	8		"	"					Sails at 8 30 A M sat
9	8								
10	8		"	"					Spanker and mainsail
11	8		"	"					
12	8								
1	8		"	"					Pumps well attended
2	8		"						
3	8		"						
4	8			"					
5	8								
6	8		"	"					
7	8		"	"					
8	8			"					
9	8			"					
10	8		"						
11	8			"					
12	8								

Course	Distance	Diff. of Lat.	Departure	Lat. by D. R.	Lat. by Obs.	Variation	Diff. of Long.	Long.	Long. by Obs.
S 72° E	232	73	180	36 57	36 57	16	226	56 29	

15085

H	K	F	COURSES	WINDS Direction	WINDS Force	LEEWAY	THERMOMETER Air	THERMOMETER Water	BAROMETER	REMARKS
1	9		E b S E							Monday 13th day of July 1696
2	8			W b S	W					
3	9									This day comes in with m
4	9									
5	9									breze and smooth seas
6	9		E b S E							
7	8									at or about 2 A M Incres
8	8									
9	8									there an Alarm Made by fir
10	8									Mr Munkes That there was
11	8			W b S	W					mutenery on board which was
12	8									deck at the time seen we were
1	9		E b S E							of what had been done but as
2	8									It was my watch on deck at
3	8									and Mr Munk was at dinner in
4	8									cabin and found that the Capt
5	8									and his 2nd Mate had
6	8									been Killed with an axe which
7	8			W b S	W					weapon was thrown overboard by one
8	8									of Mr Munks wyd steerage
9			E b S E							till hands was brought aft but
10										none could account for it
11										we then concluded to put the Ship
12										back to the Nearest Port to make
										known the same

Course	Distance	Diff. of Lat.	Departure	Lat. by D. R.	Lat. by Obs.	Variation	Diff. of Long.	Long. made	Long. by Obs.
S 72 E	212	72	162	67	=	16	201	53 0 W	

H	K	F	COURSES	WINDS Direction	WINDS Force	LEEWAY	THERMOMETER Air	THERMOMETER Water	BAROMETER	REMARKS
1	5									Tuesday 14th day of July 1696
2	5			West						
3	5									This day comes in with fresh
4	5									and heavy seas and rain squally
5	5									severall times took in and set Sails
6	5		A							as we then tried to preserve the
7	5									Ships by laying Courses and Double
8	5									Reefs in the Night and at 4 Clock
9	5									wore ship the Boat and all Hands
10	6									were Imployed by all hands
11	6									
12	6									Halifax being the nearest
1	6									Port we Intended for to
2	5									
3	5									Bearing about N N W
4	5									
5	5									720 miles
6	5									
7	5									
8	5									
9	5									
10	5									
11	5									
12	5									

Course	Distance	Diff. of Lat.	Departure	Lat. by D. R.	Lat. by Obs.	Variation	Diff. of Long.	Long. made	Long. by Obs.
	124			38 10				53 14	

Q. But why did you make—begin to make the duplicates?
A. For the vessel may go away with the log book.
Q. And what did you want the duplicates for?
A. Well, to bring with me ashore.
Q. In case the vessel went off?
A. Yes, sir.
Q. You wanted duplicates to show what took place on board the vessel?
A. Yes, sir; I was going to; yes, sir?
Q. You thought the vessel was going off when she got in?
A. I didn't know whether they would keep her or not; I couldn't tell. I knew none of us would go back on her.
Q. But it was for the purpose, in case she did go off with that log book, of having your duplicate on shore to show?
A. That was my intention, sir, for starting it.

The witness, also on cross-examination, upon being specifically asked, stated to the court and jury many differences between the log book and the so-called duplicates.

A copy of the log book from July 8 to July 15 is as follows:

The copy shows the several instances where a correction has been made on the originals of all the copies by writing a word or a figure over another.

[**Folios 108 to 111 to face page 51.**]

112 Copies of the "loose sheets" or so-called duplicates, covering the same period from July 8 to July 15, are as follows:

The copies show the several instances where a correction has been made on the originals of all the copies by writing a word or a figure over another.

[**Folios 113 to 116 to face page 51.**]

117 In cross-examination, but subsequent to the foregoing testimony in regard to the log book and the loose sheets or so-called duplicates, and after the log book and the loose sheets had been put in evidence, Mr. Bram was asked:

Q. What was the course you were sailing?
A. For Cayenne.
Q. No; what was your course that you were sailing from the day before, through the night, and up to the time that you started for French Cayenne?
A. Well, just give me the log book and I will refer to it.
Q. No; can't you recollect that?

DEFENDANT'S COUNSEL. I think he is entitled to the log book, your honors.

The district attorney then produced the log book and had certain loose sheets of paper in his hand, being the so-called duplicates.

The DEFENDANT. Let me take those (referring to the sheets the attorney held).

DISTRICT ATTORNEY. Well, you take the log book and determine from that.

WITNESS. Well, I think I am entitled to the whole thing that has any connection with this time.

WEBB, J. Your counsel will see that you have your rights. If you want anything, you may have it if it is proper. If you ask for those sheets, you are not entitled to them in reply to that question.

118 DEFENDANT'S ATTORNEY. If they will enable the witness to refresh his recollection, if your honor please, a memorandum made by him in reference to this same matter.

WEBB, J. Mr. Cotter, this witness has testified that he, day by day or habitually, entered in his log book proper memoranda, or notations, he called them, of the progress of the ship on the voyage.

Mr. COTTER. Yes, your honor.

WEBB, J. But after he got about on the other course, several days after, he took it into his head that the ship when she sailed from whatever port she might make might carry away that log book, and undertook to make what he called a duplicate.

Mr. COTTER. Yes, your honor.

WEBB, J. And the evidence this morning shows it is not by any means a copy. He was making something to be used as evidence, a pure manufacture at that time.

Mr. COTTER. It appears, however, that that was made from something else than this log book.

WEBB, J. Well, now he is asking him about this log book, to give the ship's position.

Mr. COTTER. That he copied from this log book, and we submit that he is entitled to that, your honor.

The stenographer read the question, i. e.:

"Q. What was the course you were sailing?"

"WITNESS. For Cayenne."

119 "Q. No; what was the course you were sailing from the day before, the night, and up to the time that you started for French Cayenne?"

The case then proceeded.

DISTRICT ATTORNEY. Now, I would like to have him answer.

ONE OF THE COURT. Do you object, Mr. Cotter? I saw you rise.

Mr. COTTER. I would like to have the reporter read the last two or three questions.

The stenographer read the question again, and, at Mr. Cotter's request, read what took place between himself and Judge Webb, up to and including the words by the judge: "And the evidence this morning shows it is not by any means a copy. He was making something to be used as evidence, a pure manufacture at that time."

Mr. COTTER. That statement, your honor, we object to. We take exception to your honor's statement that it was a pure manufacture.

WEBB, J. I didn't say anything about a "pure manufacture."

The STENOGRAPHER. I so understood it, your honor.

WEBB, J. Well, strike it out; strike out all that I have said. Every remark I made may be stricken out.

No exception save as above set forth was taken at this time, and none was saved or allowed by the court. The facts and all the testimony relating thereto are inserted in this bill of exceptions in order that the defendant may have such advantage of them as he may be legally entitled to.

120 The defendant, Bram, upon cross-examination, further testified that when he engaged to go on the ship he told Captain Nash that he came from Nova Scotia, yet he had not lived in Nova Scotia but

one month, and that at a time three or four years prior to so stating to Captain Nash. He also said in that connection: "But I have been through the province, you know, pretty often; been in command of Nova Scotia vessels, and that is why I hail from there."

On redirect examination he said that he showed to Captain Nash various letters of recommendation from his former employers, and he offered to introduce those letters in evidence, with a view of showing that he had dealt frankly in conveying the information that he had to the captain, and to meet the suggestion of the Government that the defendant misled the captain in stating the fact that he hailed from Nova Scotia.

On the Government's objection, the letters were excluded, and the defendant excepted, and his exception was allowed.

LESTER H. MONKS, a Government witness, who was passenger on the Herbert Fuller, had testified in chief that on the night the murders were committed he had gone to bed at about 8 o'clock, and was aroused by a scream and the sound of heavy breathing at about 2 o'clock in the morning; that he got up and went out of his room into the after cabin where the captain slept, and found the captain lying on the floor and his
121 cot overturned; that he put his hand on him, but got no speech; that he then passed into the room occupied by Mrs. Nash, to call her, and there saw what convinced him that something was wrong; that he at once went on deck and called Mr. Bram, the mate, to come below, for the captain was killed; that Bram went into the cabin with him, and remained a short time, and both returned to the deck; that soon after their return to the deck Bram began to say he was sick; that he got a drink of whiskey at 12 o'clock from the second mate; he said the second mate gave it to him in a tin cup and then threw the tin cup overboard; and that he said he thought he was drugged; that Bram then put his finger down his throat and began to vomit on the deck; that, after the steward had been called at daylight, Bram repeated to the steward what he had said to the witness about the drink obtained from the second mate; "he said that he got a drink from the second mate, who said he got it from me, and that it was drugged," and Spencer, the steward, said, "Is that so? We will put some of the vomit in a bottle and bring it ashore and have it analyzed;" and when that was said, Bram sat down on it.

Q. What happened?

A. He wiped it off the deck with his trousers.

Q. Where was he sitting when he did that?

A. Oh, he was sitting on the rail—on the starboard rail.

Q. Can you describe to the jury any more particularly how he acted just then, how Mr. Bram acted just at that moment?

122 A. He was sort of sitting up against the rail, and he sat right down and slid along, wiped it up.

JONATHAN SPENCER, the steward, called and testified in chief, testified:

Q. Did you have any conversation with Bram about the vomit?

A. Yes, sir.

Q. Tell what the conversation was; who was present, and when?
A. This was in the morning, sir, before anyone was called.
Q. And who were they?
A. Myself, the passenger, and the mate.
Q. Where was the mate?
A. The mate was up on the rail, on the starboard side.
Q. Tell us what took place?
A. The mate says the second mate gave him some whiskey last night. He says first out of a bottle; and then he spoke of the whiskey again, and he says he gave it to him out of a cup, and I says, "Out of a cup?" and he says "Yes," and I turned my eyes from him as soon as he said it was from out a cup; and he said the second mate said he got it from the passenger, and he said "I don't know if it was drugged or not, but there it is," and I went up and looked at it, and it smelt strong of liquor; and he says, "Shall we take it ashore and have it analyzed?" and I says "Yes." Then the mate, who sat on the starboard side, he fell right down in the spew; and I says, "Jesus Christ, you haven't got any-
123 thing there to take up now," and he rubbed it in the seat of his pants and made me a foolish answer. The mate said that that should be taken ashore to be analyzed, and I said, "Yes, sir."
Q. How much of it was wiped up?
A. It was all wiped up; but very little leave there.

That said sailor, LOHEAC, also testified that after the discovery of the murders, upon being relieved from the wheel, "I went on the deck load, and right between the main and mizzen mast I saw some vomit on the deck. I heard Jonathan Spencer mentioning to take some on shore. The mate Bram, who was sitting on the mast of our small boat, let his feet slip from underneath him and wiped the whole of it with his pants."

BRAM himself, on this matter, testified on the defence that after he and the passenger had come from the cabin to the deck they were stationed somewhere about the mizzen rigging on the weather side (starboard side). "And while we stayed there, I thinking of the sight that I seen down in the cabin, I got sick to my stomach, throwed up a little close to where I stood."

Recurring to this subject later in his testimony in chief, he testified:
Q. It has been stated by somebody that after the murder, and when you were on deck, that you were sick to your stomach and heaved up, and there was some talk about what you heaved up and analyzing it. Do you have in mind what I have reference to?
A. Yes, sir.
124 Q. Well, now, what have you to say about that?
A. Well, to the best of my recollection about that, there was very little of this stuff, and whatever was said about this it was said after I had slid into it.

On cross-examination he testified:
X Q. Now, let me have you tell us once more what you said about the vomit to Monks and Spencer.
A. In regard to writing that document?

X Q. No; with regard to the vomit, when you were there on deck and the vomit was there. Please tell us just what you said and they said about that vomit.

A. I remember when Monks and I came up on deck, after I had seen the condition the captain was in, I got sick to my stomach from seeing the sight down below and throwed up a little on the weather side—the starboard side. The next morning—there was nothing said about it then—the next morning I went along—probably I better take the model here.

DISTRICT ATTORNEY. I guess you can tell where you were.

A. Mr. Monks and I stationed about just abaft the mizzen rigging. As mentioned previously, we had a temporary rail built of this 3 x 4 stuff that came up about two feet six inches about the deck load. We both staid around here [indicating]. One time we sat down, and another we kept walking. This little bit that was throwed up was somewheres around here, just abaft the mizzen rigging. There was nothing said about that till the next morning. Who brought the conversation
125 up I do not just remember, but Mr. Monks says, "You probably might have been drugged." Said I, "I don't think the second mate had any drug in that bottle." "What do you know about it?" He says, "Well, you don't know what was in that drug—that liquor you gave me." And I says, "That didn't make me sick, I don't believe, because there is very little of it thrown up." We came along here [indicated] and I leaned against this rail. To the best of my recollection, my feet slipped some way or other from under me, and I remember the slippers I had on got into this little bit of stuff, this bread sandwich. We stood on the deck there then; and there was nothing more said about it to my knowledge, about analyzation or nothing else.

X Q. Nobody said that?

A. Not to my knowledge, sir; I don't remember.

By ONE OF THE COURT. You said it was wiped up by your slippers?

A. The slippers, yes, sir; that slid into it. I was standing close up, leaning on the rail.

After the evidence for the defendant was closed the Government called as a witness in rebuttal Lohcae, one of the crew. He was asked:

Q. Whether or not you noticed on the morning after the murder any vomit on the deck load?

A. Yes, sir.

Q. Describe how much and what the size of it was.

126 The defendant objected to the question on the ground that the matter had already been inquired into of the witness on the Government's case in chief, and, further, that the question of the amount of vomit was a collateral matter, brought out on the cross-examination of defendant. The exception was overruled and exception taken and allowed.

A. It was about as large as the top of a spittoon.

LESTER H. MONKS, being recalled, testified (the same objection being made and overruled and exception taken and allowed):

A. I think there was a good deal.

(Objection was made to the witness using the expression "I think." This objection was sustained.)

Q. Can you describe it?

A. It covered quite a space on the deck.

Q. Please define "quite a space."

A. I should say a space as big as that on the deck [showing with his hands on the witness stand].

Upon his direct examination the defendant testified that Cayenne, in French Guiana, was, under the conditions existing of the wind after the murder, the nearest port towards the port of the destination of the vessel, which was Rosario, up the river Platte above Buenos Ayres, and he further testified on cross-examination that the ordinary trip from Boston to Buenos Ayres took fifty or sixty, sixty-five, probably seventy days.

127 In rebuttal the Government called EDWARD G. PARKER, a sea captain of forty-two years' experience at sea, thirty-five of which as captain, who testified that under favorable conditions it would take from fifty to sixty days from Boston to Buenos Ayres. He was asked how long it would take to go from Cayenne to Buenos Ayres.

It appearing from answers to questions put to him by defendant that the witness had sailed from Boston to Buenos Ayres, from Boston to Cayenne, and from New York to Cayenne, but that he had never sailed from Cayenne to Buenos Ayres, or to Cape St. Roque, nor to any other South American port, the defendant objected to the question.

The objection was overruled and the witness answered:

"Not less than 75 or 80 days."

Exception to the admission of the evidence, which exception was allowed.

In making its case in chief the Government had called one Lester H. Monks, who testified in substance that Bram, on being called and notified that the captain had been killed, went into the cabin with the witness and went into the room of the witness and waited for him to put on some clothes; that at that time both passed through the captain's room to the passenger's room, but that neither went to the captain, nor to the second mate's room, nor to Mrs. Nash's room.

128 In the defence, Bram, the defendant, testified on his direct examination, in substance, that when he went into the cabin with Monks, a lantern hanging in the main cabin, and with the flame turned low, was taken down and the flame turned up quite bright; that passing through the after cabin, where the captain was, he saw the captain lying there dead, or nearly dead. Once in a while there would be a gurgling sound—this sound he imitated—giving the sound of heavy stertorous breathing, and quite a time afterwards another such sound; that he, seeing this, went over to the captain's feet (which were towards the passenger's room) and felt of his feet, and they were cold; that with that he ran back into Monks's room, and stationed himself by the door, and kept peeping on the outside, looking all around, because the cabin was then in perfect darkness, in the further or main cabin, while Monks was putting his clothes on; that when Monks had put his clothes on, he, Bram, said, "Let us go into Mrs. Nash's room now and see Mrs. Nash's room," and that

Monks replied, "It ain't no use to go in there; I have been there; she is dead already; don't lose any time in this cabin; there is too many holes around," and that both then returned to the deck.

Upon his direct examination Bram testified:

"Monks said to me, 'Where is the second mate?' Says I, 'It is his watch below. Ain't he in his room?' He said, 'I didn't see him.' 'Well,' said I, 'if he is not down there he is forward with the
129 men.' We came back and stood here. Said I, 'Monks, let us go forward and wake the steward up.' He says, 'Don't neither you nor I leave this station where you are, because we don't know who is under these boats here forward.' 'Well,' said I, 'I think it is better to get some one with us than to be alone.' Said he, 'We will wait till daylight and call the steward. Don't move here, because it ain't safe.' Said I, 'All right; we won't move, then.'"

He also testified that while they were sitting there on the deck he started to go look for the second mate, but that Monks called him back; and he denied that he told Monks that he (defendant) had not been down in the cabin since 12 o'clock at night.

LESTER H. MONKS, being recalled in rebuttal by the Government, testified in answer to questions as follows:

Q. When you and the mate, Bram, went down into the cabin—when you first called him, and he went down with you into the cabin—what, if anything, did he do in regard to the captain's feet?

Mr. COTTER (defendant's attorney). Wait a moment. That they went into in chief, if your honors please, clearly.

DISTRICT ATTORNEY. No; beg your pardon.

Mr. COTTER. The witness was examined in relation to it.

COLT, J. The question is admissible, limited as it is.

Mr. COTTER. We will ask your honor to save our exception.

(Exception allowed.)

A. He did not go anywhere near the captain at all.

130 Q. Did he touch the captain's feet?

A. No, sir.

Q. When you were down there at that time, what, if anything, did he do in regard to looking out of your door, and through the chart-room door into the forward cabin?

A. He didn't look out there at all. He was inside in my room the whole time.

Q. How far inside your room?

A. Right inside the threshold, sir, two or three feet.

Q. Did he stand at your door and peek out into the forward cabin through the chart-room door?

Mr. COTTER. Wait a moment. We object on the other ground, in addition to the ground stated, that this is a matter brought out in cross-examination, if your honors please.

COLT, J. Admitted.

Mr. COTTER. I except.

(Exception allowed.)

A. No, sir; he did not.

Q. While you were down in the cabin together, either in your roo
or on the way from your room to the forward companion-way, did t
mate, Bram, say anything to you, and if so, what, about going into M
Nash's room?

Mr. COTTER. The same objection, your honor.

(Admitted, exception taken, and allowed.)

A. He said nothing at all, sir, about it; didn't mention it.

131 Q. Did you say anything to him, and if so, what, in regard
its being of no use to go in there?

A. No, sir.

Q. Did you have any conversation with Mr. Bram while you and h
were on deck, immediately after your discovering the murders, in regar
to his having gone below between twelve and two o'clock?

Mr. COTTER. We make the same objection.

(Admitted and exception taken and allowed.)

A. He told me he had not been below since twelve o'clock, when h
had the drink with the second mate.

On his cross-examination Bram had testified for the first time tha
during the night of the murders, and after they had been committed, h
was going down to see if the second mate was in his room; that wa
after Monks had asked where the second mate was.

Monks, when recalled in rebuttal, was asked, "Whether or not th
first mate (Bram) got up and walked in the direction of the second mate'
room, and whether or not you called him back?"

(Objected to; admitted. Exception allowed.)

A. He did not get up at all, and I did not call him back, because he
did not get up.

The Government in rebuttal called Thomas Cutler, who testified that
he had at one time been chief mate of the "Herbert Fuller." He
132 was then asked as to what was the proper position of the mate at
night on board the vessel. This was objected to, and the court
said:

COLT, J. At the stage which this case has reached we don't think the
question admissible. Excluded.

He was then asked by the Government:

Q. Have you ever steered the "Herbert Fuller?"

A. Yes, sir.

Q. How did she act?

Mr. COTTER. One moment.

Mr. FRENCH. That has all been gone into in the testimony in chief
by the Government.

Mr. HOAR. I won't in-si-st upon it.

COLT, J. Question withdrawn.

The district attorney, in his closing argument to the jury, said: "He
(referring to the defendant) says that Charlie Brown could leave that
wheel. I say he could not. They have produced a lot of sea captains
to say that he could leave wheel. I put on Mr. Cutler, who was a mate
on that vessel, and if you can argue from the nonproduction of wit-
nesses, can you not argue from the failure to put questions?"

Mr. COTTER. We except to that evidence—evidence excluded by the court and called out of order. We submit it is not proper, and we except to that branch of his argument.

WEBB, J. The facts are before the jury, the fact of the calling of the witnesses.

Mr. HOAR. I withdraw that. That may be stricken out.

133 At the conclusion of the evidence, and after the counsel on both sides had fully presented their views to the jury in arguments, without restriction of time, the court instructed the jury, and among other things instructed them thus:

"You are now approaching that part of this proceeding where the sole responsibility rests upon yourselves. You have heard the evidence, under such directions as the court has given with regard to its admissibility; you have seen the witnesses; you have heard the arguments of counsel upon both sides. But you are to remember that testimony, to analyze it, to weigh it, to compare its different parts together to determine for yourselves what the evidence establishes to your minds, and act upon it. You are not to be governed by the arguments of counsel beyond that degree to which they commend themselves to your own understanding and your own intelligence. You are not to be affected by any admissions or statements made by counsel in opening or closing, but you are to be governed by the evidence and the law. You are not to be affected by any supposed indication of an opinion of the court, or if an opinion had been directly expressed to you by the court you would have no authority to accept it in substitution for your own independent, original, careful determination on the matters yourselves. But in so far as you find the arguments of counsel supported by the evidence and by sound reasoning, compatible with the common knowledge of man-
134 kind, in so far you will respect them. But you are the final arbiters of the evidence and of the fact under the law as the court shall give it to you."

At the conclusion of the charge, and before the jury had retired, the counsel on either side, upon inquiry, having stated that they took no exception to the charge and had no further requests for instruction to make, one of the defendant's counsel said, "We desire to make a general exception, to save our rights simply," and then passed to the court a written paper as follows:

"And now comes the defendant, after the charge and before the jury have retired, and claims an exception to all objectionable and prejudicial matter, whether it was elicited by the Government or the court, and to all statements of fact and opinion, and examination of witnesses by one member of the court during the trial, which said matter, statements of facts and opinion, and examination of witnesses more specifically appear in the official stenographic report of said trial, to which reference is hereby made at pages 1080, 1348, 1372, 1385, 1482, 1483, 1484, 1490, 1572, 1593, 2000, and aliunde, and whether such statements, opinions, and examinations were withdrawn or not, on the ground that no right of exception is or can be waived in a capital case."

The matters above referred to upon which the defendant relies in support of the above exception are as follows:

In the testimony of Francis M. Loheac (page 1080 of said stenographic report):

135 "Q. (By WEBB, J.) When the vessel was allowed to fall off or come up in the wind from any cause, would a person upon the deck know the facts?

"A. Yes, sir."

In the cross-examination of the defendant, Bram (pages 1347 and 1348 of said stenographic report), he was asked by the district attorney:

"Q. Didn't you tell Lester Monks that you were a French Canadian?

"A. No, sir.

"Q. Never on board that ship?

"A. No, sir.

"Q. If he says that, is he telling what is not true?

"Mr. COTTER. Wait a moment. We object.

"WEBB, J. What is your objection?

"Mr. COTTER. He said, 'Is that untrue?'

"Mr. HOAR. No, no, no, that is not what I said.

"Mr. COTTER. I so understood your question. 'If he says that, does he say that which is untrue?' I don't think the witness is called upon to express an opinion.

"WEBB, J. It is not expression of opinion if he denies a fact within his own knowledge.

"Mr. COTTER. It may be—I don't think he is called upon to characterize that, if your honor please, whether that is untrue or not.

"WEBB, J. The question is only meant to emphasize the other
136 answer. He says he never did tell Mr. Monks so. If he never did, and Monks says he did, everyone will understand the consequence."

Also at page 1572 of said stenographic report, the remarks of Mr. Justice Webb during the colloquy in regard to the sheets with similar entries to those in the log book, printed on pages of these exceptions.

"Said Sailor Brown testified in relation to his appearance before the grand jury as a witness as follows:

"Q. (By Mr. HOAR.) Did you testify before the commissioner here in Boston? Did you tell your story here in Boston in court before?

"A. No, never.

"Q. Did you tell a story before the grand jury in Boston?

"A. Yes, sir.

"Q. When before to-day were you in this court in this case?

"A. I beg pardon?

"Q. When before to-day were you in this court room the last time?

"A. The 22nd of November.

"Q. The 22nd of November?

"A. I beg pardon; the 22nd of October.

"Q. Of October?

"A. On the grand jury.

"Q. On the grand jury?

"A. Yes, sir.

137 "Q. What happened to you then?
"A. I was set free.
"Q. You were set free?
"A. Yes, sir."

* * * * * * *

From the cross-examination:

"Q. (By Mr. COTTER.) The first time you made a statement under oath in this country, then, was when you went before the grand jury?
"A. Yes, sir.
"Q. On the 22nd of October?
"A. Yes, sir.
"Q. How long were you before the grand jury?
"A. In the course of two hours.
"Q. Who conducted your examination?
"A. The district attorney, Mr. HOAR.
"Mr. HOAR. That is entirely illegal, your honor, for him to go into questions before the grand jury, but I make no objection to it.
"Mr. COTTER. I am not going into the testimony at all. You have gone into that already, that he appeared before the grand jury.
"Q. You did not see, or did you, Mr. Bram present?
"A. No, sir.
"Q. And you knew that nobody was there representing Mr. Bram?
"Mr. HOAR. I pray your honor's judgment.
"WEBB, J. He could not know that except by hearsay.
138 "The WITNESS. I don't know nothing.

* * * * * * *

"Q. Did you know that you would be permitted to go free or remain in jail only as a witness in case you testified before the grand jury against Bram?
"A. I beg pardon; I don't understand.
"Q. Did you understand that you would be permitted to go free or be held only as a witness if you went in before the grand jury and testified against Bram?
"A. Yes, sir.
"Q. Yes. Who told you that?
"A. The judge.
"Q. The judge?
"A. Yes, sir; that he would set me free.
"Mr. HOAR. He don't understand you. I don't think he understands the question.
"Mr. COTTER. The fault is not with my question.
"COLT, J. Divide your question, Mr. Cotter, and it will be plainer.
"(Question read by stenographer.)
"Q. Did you understand that by going before the grand jury and testifying that Bram killed those people on board of the——
"WEBB, J. If you will leave out some of those circumlocutions, Mr. Cotter——
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"A. I beg pardon?

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"A. No, sir.
"Q. And you knew that nobody was there representing Mr. Bram?
"Mr. HOAR. I pray your honor's judgment.
"WEBB, J. He could not know that except by hearsay.
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"Q. Did you understand that you would be permitted to go free or be held only as a witness if you went in before the grand jury and testified against Bram?
"A. Yes, sir.
"Q. Yes. Who told you that?
"A. The judge.
"Q. The judge?
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"Q. Did you understand that by going before the grand jury and testifying that Bram killed those people on board of the——
"WEBB, J. If you will leave out some of those circumlocutions, Mr. Cotter——
"The WITNESS. I don't understand you.
139 "Q. Did you understand by going before the grand jury and testifying against Bram you would be permitted to go free?

"A. I understood so much, that if——

"Q. What?

"A. I would understand so much, if I came in before the grand and the grand jury saw me and they did not find any bill against would be set free.

"Q. Who told you that? Did anyone tell you by coming before grand jury they would find no bill?

"A. I didn't know anything about that when I came in.

"Q. Who sent for you to come?

"A. To come into this court, sir?

"Q. Who sent for you to come before the grand jury?

"A. I don't know. Mr. Waters came down for me.

"Mr. HOAR. He says Mr. Waters.

"Q. Before Mr. Waters, the deputy marshal, came for you, didn't know you were going to be called before the grand jury to testify aga Bram?

"A. No, sir.

"COLT, J. I think if that model was removed it would be better.

"Q. Was there nothing said to you about coming before the gr jury?

"A. No, sir.

"Q. At the time you appeared before the grand jury and testified, you understand that you were held on the charge of murder?

140 "A. Yes, sir."

* * * * * * *

From the redirect examination:

"Q. (By Mr. HOAR.) When you came before the grand jury h anybody made you any promise of what would happen if you testifi there?

"A. Nobody spoke"——

The senior counsel for the defendant during his closing argument us the following language:

"The grand jury assembled in October, and you are solemnly informe by the learned district attorney that the grand jury found no bill again Brown. There is something he did not tell you, but which appears the evidence now, Mr. Foreman and gentlemen, that Brown, a defenda charged with murder, under some mysterious arrangement is brough before the grand jury——

"Mr. HOAR. I beg your honor's pardon. There is no evidence what the arrangement was; none at all, on God's footstool.

"Mr. COTTER. I beg your pardon.

"WEBB, J. Let us hear what the arrangement was.

"Mr. HOAR. Mr. Cotter says that under some mysterious arrange ment Mr. Brown is brought before the grand jury. Now there is abso lutely no evidence on that subject on this case whatsoever. I do no think it is proper——

141 "Mr. COTTER. I want to be heard on that, if your hono please. Brown is charged with murder. Brown testified him self that he was brought before the grand jury and permitted to testify Bram has testified that he was not brought before the grand jury and

was not permitted to testify. I say that there is a discrimination between these two men, and I have a right to argue from that discrimination that there is a mysterious arrangement.

"Mr. HOAR. If your honors please——

"Mr. COTTER. An extraordinary——

"WEBB, J. It is farfetched, but we do not propose to interfere."

The court, after deliberation, said to counsel:

"We are now prepared to dispose of the exception which was offered at the close of the instructions given to the jury yesterday afternoon. At the conclusion of the charge to the jury the counsel were asked whether they excepted to the instructions—to anything included in or omitted from them. The reply was that the charge was entirely satisfactory. The counsel for the defendant then presented a paper claiming an exception of the most indefinite character to all objectionable and prejudicial matter. Under the rules and practice of the United States courts exceptions must be taken to any evidence or other matter as it arises or is offered and must then be reserved, and if that is not done exceptions are not allowed. The exception claimed, as above
142 stated, not complying with the rule and practice of this court, is not allowed."

Though the general exception thus referred to is not allowed, it is inserted here at the request of defendant's counsel, that if it should have been allowed the defendant may have the full benefit of their claim, and shall not be deprived of any right by the refusal of the court to allow the exception claimed.

After the jury had been deliberating upon their verdict between 19 and 20 hours they were brought into court and reported that they had not agreed; thereupon they were instructed by the court as follows:

"In respect to your duties I desire to read to you from one of the leading cases on the subject.

"'The only mode provided by our Constitution and Laws for deciding questions of fact in criminal cases is by the verdict of a jury. In a large proportion of cases, and perhaps strictly speaking in all cases, absolute certainty cannot be attained or expected. Although the verdict to which a juror agrees must of course be his own verdict, the result of his own convictions, and not a mere acquiescence in the conclusion of his fellows, yet, in order to bring twelve minds to a unanimous result, you must examine the questions submitted to you with candor and with a proper regard and deference to the opinions of each other. You should consider that the case must at some time be decided, and that you
143 are selected in the same manner and from the same source from which any future jury must be, and there is no reason to suppose that the case will ever be submitted to twelve men more intelligent, more impartial, or more competent to decide it, or that more or clearer evidence will be produced on one side or the other. And with this view it is your duty to decide the case if you can conscientiously do so. But in conferring together you ought to pay proper respect to each other's opinions and listen with a disposition to be convinced to each other's arguments. And on the other hand, if much the larger number of your panel are for a conviction, a dissenting juror should consider whether a

doubt in his own mind is a reasonable one which makes no impression upon the minds of so many men equally honest, equally intelligent with himself, and who have heard the same evidence, with the same attention, with an equal desire to arrive at the truth, and under the sanction of the same oath.

"'And, on the other hand, if a majority are for acquittal, the minority ought seriously to ask themselves whether they may not reasonably and ought not to doubt the correctness of a judgment which is not concurred in by most of those with whom they are associated, and distrust the weight and sufficiency of that evidence which fails to carry conviction to the minds of their fellows.'

"I think, gentlemen, what I have said sufficiently answers the communication which you made to the court. You will therefore retire for further consideration of this case."

144 To the foregoing instructions the defendant at once excepted and the exception was allowed.

The jury returned a verdict of guilty.

After verdict, and before judgment, the defendant filed a motion for a new trial, supported by affidavits as follows:

(Copy of first motion and affidavits to be inserted here.)

[Caption omitted.]

Defendant's motion for a new trial.

And now comes Thomas M. Bram, the defendant in the above-entitled cause, and moves that the verdict therein be set aside and a new trial ordered, for the following reasons, namely:

First Because the verdict is against the evidence and the weight thereof.

Second. Because the interruptions, statements of fact and opinions, and examinations of witnesses, by one member of the court during the trial were partial, argumentative, and unduly prejudicial to the defendant, insomuch that the defendant has been deprived of a fair trial; and because incompetent and prejudicial matter, introduced by one member of the court by questions and statements and characterizations of the defendant and his testimony and of the closing argument in his behalf, forced the defendant's counsel to protest in the presence of the jury, and thereby to place themselves in the attitude of antagonizing the opinion of the court in respect to the question of guilt or innocence of the defendant; and because the withdrawal of such matter, statements, opinions, and characterizations (where they were withdrawn) could not, and did not

145 remove the unwarrantable influence and prejudice thereby injected into the minds of the jurors.

Third. Because the closing argument of the United States attorney was improper in tone, language, and manner, and because its tendency was, and its effect must have been, to unduly excite the passions of the jury and to arouse in them a feeling of hatred and contempt for and prejudice against the defendant, as well by reason of its said tone, language, and manner as by unjustifiable inferences and deductions from the testimony, and by innuendoes from assumptions of fact not in evidence, and further because he argued upon evidence excluded by the court.

Fourth. Because it appears that the jury misapprehended and misapplied the instructions of the court given them on the morning of Saturday, January second, 1897, when the jury came into court for further instructions, insomuch that they believed, or certain of them believed, that they were then instructed that they must of necessity agree; that the minority must of necessity conform to the opinion of the majority, and that it would not be lawful for them to disagree unless they unanimously concurred in disagreeing.

Fifth. Because it appears that certain of the jurors had prejudged the defendant.

Sixth. Because of the misconduct of certain of the jurors during the trial.

Seventh. Because of the misconduct of certain of the jurors after the case had been given to the jury.

146 Eighth. Because a certain person or persons in the service of the United States were permitted to and did improperly communicate and intermeddle with certain of the jurors during the progress of the trial.

THOMAS M. BRAM,
By his Attorneys,
JAMES M. COTTER,
ASA P. FRENCH.

[Caption omitted.]

Affidavit of Harry J. Booth, filed in support of defendant's motion for a new trial.

I, Harry J. Booth, of Hyde Park, in the Commonwealth of Massachusetts, of lawful age, on oath depose and say:

That I was one of the panel of petit jurors before whom the above-entitled cause was tried; that on or about the 18th day of December, 1896, after the jury had heard the evidence of numerous witnesses called by the United States in support of the charge set forth in said indictment, and while said jury was in charge of the United States marshal, or his deputies or assistants, after an adjournment or during an intermission of the court, while the jury was passing from the court room to the jury room through the hall way or corridor, on the same floor as the court room, a young man, whose name I understand to be Harrington, an assistant of the United States marshal for this district, who had at different times assisted the two bailiffs who had charge of the jury, approached me and said to me privately, "Look in your hat." My hat at

147 this time was in the jury room and on a hook, the number of which correspond' with the number of my seat on the panel, to wit, No. 3. Upon reaching the jury room and looking in my hat I found, tucked within its band, a slip of paper containing certain writing, of which the following is a copy, and the original of which I append hereto, marked "Exhibit, Affidavit of H. J. B.":

"Would you like a ½ pint? If so, give me the tip Sat. morning. I will put it in your pocket. Red."

I did not understand and had no means of ascertaining why the aforesaid official had thus approached me, or why this paper was thus placed

in my hat, and I was greatly embarrassed thereby, and immediately reported what had occurred to the foreman of the jury and also to one of the bailiffs in charge of the jury. I in no way invited or solicited the writing aforesaid or what is apparently therein referred to.

I further depose and say that after the court advised the jury not to discuss the merits of the case on trial before us until the conclusion of the trial, just after the adjournment of court on a day when the defendant was upon the witness stand and his evidence unfinished, which evidence he resumed on the following morning, one of the jurors, Oliver J. Briggs, said: "I am a Freemason; the defendant Bram is not a Freemason; he is a hypocrite." That this statement by Briggs was in the presence and hearing of several of the jurors and was addressed to them.

I further depose and say that meals were served to the jury in the jury room; that two waiters and two bailiffs also entered the room
148 and were with the jury during the serving of meals in the jury room; that on the afternoon or evening of the first day of January, 1897, after the case had been submitted to the jury and after it had been deliberating upon the case, the two bailiffs in charge of the jury, and a deputy of the marshal of the United States for this district, Mr. McDonald, entered the jury room and there had supper with the jurors.

(Signed) HARRY J. BOOTH.

The above was duly sworn to on 14th January, 1897.

The exhibit annexed to affidavit was a piece of paper on which was written:

"Would you like a ½ pint? If so, give me the tip Sat. morning. I will put it in your pocket. Red."

The aforesaid affidavit of said Booth was typewritten and signed in ink, and when the affidavit was read in court the typewritten words "during their deliberations," in the sentence "I further depose and say that meals were served to the jury in the jury room during their deliberations," were stricken out in lead pencil.

149 [Caption omitted.]

Supplementary affidavit of Harry J. Booth, filed in support of defendant's motion for a new trial.

I, Harry J. Booth, of Hyde Park, in the Commonwealth of Massachusetts, of lawful age, on oath depose and say:

That I was one of the panel of petit jurors before whom the above entitled cause was tried; that after the case had been given to the jury and while we were deliberating thereon, to wit, on Friday evening, January 1, 1897, one of the jurors suggested that an experiment be tried for the purpose of ascertaining whether a man at the wheel of the "Herbert Fuller" could look in at the window of the chart room of said vessel and see anything there; that such experiment was thereupon tried, substantially as follows:

We measured from the bottom of the toilet room door to the glass light in said door to get the height of said chart room window, as it would be from the cabin door, and as it would appear to one on deck; we then marked off on the glass of said door a space representing said window,

the remainder of said glass being then covered with napkins, so that the space representing said chart room window might be clearly defined; we then took two tables, each of which measured about two feet six inches in height, and placed them side by side against said door on the outside; we then marked off the distance from the area representing the window as aforesaid, diagonally on the surface of said tables, to a place representing the position of the wheel, and then measured back from said place
150 representing the position of the wheel the distance to the outside of the partition of the afterhouse, the center of the wheel being designated by a cane. Then two of the jurors went into the toilet room and the gas in said room was turned very low, after which several of the jurors stood at the place on the table designated as the position of the wheel as aforesaid, and looked to see if the figures of the men in the toilet room could be discerned. Before this was done the ground glass of that part of the toilet room door representing said chart room window was made transparent by the application of water. The forms of the men inside were visible.

(Signed) HARRY J. BOOTH.

The above was duly sworn to on January 14th, 1897.

[Caption omitted.]

Affidavit of James J. Connell in support of defendant's motion for a new trial.

I, James J. Connell, of Cambridge, in the Commonwealth of Massachusetts, of lawful age, on oath depose and say: That I know Oliver J. Briggs, of said Cambridge, one of the panel of petit jurors before whom said cause was tried; that I have known him for about nine years; that some time prior to the beginning of said trial, to wit, on or about the fifth day of December, 1896, he, the said Briggs, speaking to me of the defendant, said in language substantially as follows: "There isn't the least
151 doubt but things are looking bad for Bram, and I believe he is guilty."

(Signed) JAS. J. CONNELL, *Cambridge.*

BOSTON, *January 15th, 1897.*

The above was duly sworn to.

[Caption omitted.]

Affidavit of Sylvanus B. Coffin, filed in support of defendant's motion for a new trial in said case.

I, Sylvanus B. Coffin, of Hyde Park, in the Commonwealth of Massachusetts, of lawful age, on oath depose and say that I am well and personally acquainted with Abel C. Ford, of said Hyde Park, one of the jurors in the aforesaid case; that on last Sunday afternoon (January 10th, 1897) the said Ford came to my place of business in Everett Square in said Hyde Park, and while there said Ford engaged in conversation about the recent trial of the aforesaid case. During the conversation Mr. Ford

stated that he, Mr. Ford, said before the trial of said case that the defendant Bram ought to be hung.

(Signed) SYLVANUS B. COFFIN.

The above was duly sworn to on January 15, 1897.

152 [Caption omitted.]

Affidavit of Asa P. French in re defendant's motion for a new trial.

I, Asa P. French, of Randolph, in the Commonwealth of Massachusetts, of lawful age, on oath depose and say that I am of counsel of record for the defendant in the above-entitled cause; that at the time of the empanelling of the petit jury in the said cause I did not know, and had no reason to know, or to believe, that either Oliver J. Briggs or Abel C. Ford, two of the panel before whom said cause was tried, had prejudged the defendant, or had expressed any opinion adverse to the innocence of the defendant.

(Signed) ASA P. FRENCH.

The above was duly sworn to on 19th day of January, A. D. 1897.

153 [Caption omitted.]

Affidavit of James E. Cotter in re defendant's motion for a new trial.

I, James E. Cotter, of Hyde Park, in the Commonwealth of Massachusetts, of lawful age, on oath depose and say that I am of counsel of record for the defendant in the above-entitled cause; that at the time of the empanelling of the petit jury in said cause I did not know, and had no reason to know, or to believe, that either Oliver J. Briggs or Abel C. Ford, two of the panel before whom said cause was tried, had prejudged the defendant, or had expressed any opinion adverse to the innocence of the defendant.

(Signed) JAMES E. COTTER.

The above was duly sworn to on nineteenth day of January, A. D. 1897.

154 This motion came on to be heard, and the proceedings at the hearing and the rulings of the court were as follows:

A preliminary question whether the facts alleged in the affidavits should be shown by the affidavits or by the evidence of the several affiants in open court was first considered, and the decision was that the defendant might put in the affidavits. They were then read.

Witnesses were called and severally testified under various objections as fully stated below.

RINALDO A. JACK, sworn.

Q. (By Mr. COTTER.) Your name is Rinaldo A. Jack?

A. Yes, sir.

Q. Were you foreman of the jury?

A. Yes, sir.

WEBB, J. We recognize him as foreman of the jury.

Q. Did you ever see that paper before [turning to the court]? I am calling his attention to the paper that was annexed to the first Booth affidavit.

Mr. HOAR. Excuse me, Mr. Cotter, but I want to see it.

Mr. COTTER. Yes; I will show it to you before offering it to the court.

WEBB, J. The paper said to have been in the hat?

Mr. COTTER. Do you object——

Mr. HOAR. I object to asking this man any questions as to what took place between himself and any other juror in the jury room, if your honors please.

155 * * * * * * *

COLT, J. You may answer that question.

Mr. HOAR. I have no objection to it.

A. I think Mr. Booth had a paper like that in his hands. I did not take the paper from him, but he read it in his hand.

COLT, J. You will not answer any question, Mr. Jack, until the court rules on it.

The WITNESS. I think that is the paper; yes, sir. I didn't take the paper.

Q. Where did you see it, Mr. Jack?

A. In the jury room.

Q. And when?

A. I think it was on Friday.

Q. Of what week?

A. Of the second week of the trial, I think.

WEBB, J. The Friday of the second week of the trial was Christmas day. It could not have been the second Friday.

The WITNESS. The second Friday was Christmas day. It might have been Thursday, then; I can't say positively; I didn't pay much attention to it.

Q. Might it not have been the first Friday, Mr. Jack?

A. No; I know it wasn't.

Q. It was while the case was on trial?

A. Yes, sir.

Q. Do you remember what witness was on the stand on the day when that was presented to you?

156 A. I do not.

Q. Did you see where Mr. Booth obtained the paper?

A. I didn't know that he had the paper in his possession until yesterday.

Q. No; but when you saw it he had the paper in the jury room?

A. He had the paper in the jury room. He held it in his hand and read it over to me. I didn't take the paper in my hand.

* * * * * * *

Q. Did you see what Mr. Booth did with that paper?

A. I did not, sir.

Q. Did he speak with anybody else in your presence about it?

A. No, sir.

Q. Now, did you fit up a part of the jury room for the purpose of trying experiments?

Mr. HOAR. I object.

COLT, J. Do not answer. What was the question, Mr. Cotter?

Mr. COTTER. Did you fit up any part of the jury room for the purpose of trying experiments in the jury room and applying the evidence in this case to them?

Mr. HOAR. I object, and I would like to be heard on the question of law involved.

* * * * * * *

157 Q. (By Mr. COTTER.) I remember, Mr. Jack, the question put to you was in regard to experiments tried in the jury room; and will you tell us whether there were any?

A. Yes, sir; we tried an experiment there.

Q. You may state what was done.

A. I don't know as I can give you the exact idea about it. We got a couple of tables there and took the measurements from the plans of the "Herbert Fuller," and set up a couple of tables inside of the toilet-room door and measured off a plate of glass the same size of that of the "Fuller."

Q. You may state the size, Mr. Jack.

A. 11 by 16, the glass was.

Q. And where was that glass?

A. In the toilet-room door.

Q. Did you cover over the remaining part of the pane of glass?

A. Yes, sir.

Q. With what?

A. With a napkin.

Q. Did you use anything else than the napkins and the table?

A. Not there in that room.

Q. Did you anywhere else?

A. We used a rule, two men in-side—one had the imaginary axe in his hand.

Q. Had a what?

A. Had a stick in his hand, as if striking a blow.

158 Q. Where was that stick obtained?

A. It was a rule which we took off from the table.

Q. And how far were you away, or were the people who made the observations away from the person who held the rule?

A. Six or seven feet.

Q. Were they on the same or on a different elevation?

A. On the same elevation that we took the measurement from the plan.

Q. Whether both persons were on the same elevation—that is, the person who held the rule and the person who made the observation?

A. One was a kind of sitting down on the floor, which would bring his head up about two feet from the floor; the other was standing up.

Q. Was the floor of the jury room and the floor of the toilet room on the same elevation?

A. It is on the same level, those two floors, but we were standing on the table.

Q. And did you use something to represent the wheel?

A. No, sir; we had an imaginary wheel.

Q. What was that?

A. A cane was laying down to the shaft of the wheel, and then we stood over that, on the side of it, and held our hands out like that [indicating] on the imaginary wheel, and held them there.

159 Q. Where was that cane obtained from?

A. I think that was right there in the jury room; it had been there all through the trial.

Q. Where did the napkins come from? Were they there through the trial?

A. They were there in the jury room.

Q. Through the trial?

A. They were some which were there while we were having our lunch there the past week or two; some napkins were laying there all the time; we used them for towels when we got short—took the napkins for towels.

Q. Do you remember when it was you tried these experiments which you have mentioned?

A. As near as I can recollect, I think it was about ten o'clock at night.

Q. Friday night?

A. Yes, sir.

WEBB, J. Did he state what night?

Mr. COTTER. Friday night, your honor, on the night of the first day after the case was submitted to the jury.

Q. That is our understanding, Mr. Jack?

A. Yes, sir.

Q. How long had you and your associates, or some of you, been trying or testing the experiment?

A. Well, we had been looking over the plans there, and one or two of the jury proposed to rig up the imaginary deck there, and chart room, and see if we could see through the window.

160 Q. Did you use anything to represent the curtain—the curtain on the inside of the glass?

A. No, sir; we did not.

Q. The wire?

A. No, sir.

Q. Did you use anything to represent a cot?

A. No; we did not. The man sat down so as to bring his head about the height of a cot from the marble floor.

Q. What light did you use?

A. We used the gas burner in the farther end of the toilet room, turned very low.

Q. How far was the man inside from the gas; do you know?

A. Well, within five or six feet of it.

Q. Now, in regard to this piece of paper—I will advert to that again—in regard to that piece of paper that your attention was called to yesterday. Did you observe or notice where Mr. Booth obtained that paper?

A. I did not.

Q. Well, without giving the conversation, I will ask you if he told you——

Mr. HOAR. Excuse me.

Mr. COTTER. I asked him not to give the conversation.

Mr. HOAR. What was your question before that?

Mr. COTTER. I asked him first to state what he told him.

* * * * * * *

161 Q. Did Mr. Booth tell you where he obtained that paper?

A. He did.

Mr. COTTER. If your honors please, while at the outset I was inclined to think that I would not put the other question, yet, after conference with my associate, we think that there are grounds for asking the question.

COLT, J. You may ask the question, but Mr. Jack will not answer it until it has been ruled upon.

Q. Where did he state he obtained the paper?

Mr. HOAR. I object.

COLT, J. Excluded.

Mr. COTTER. And I will ask your honor to save the exception.

COLT, J. Exception reserved. Judge Webb suggests that there are no exceptions, perhaps; it is within our discretion.

WEBB, J. In this matter addressed to the court for a new trial, for reasons stated, there are no exceptions; we will exclude it, at all events.

COLT, J. We will exclude it, at all events, and we will reserve your exception, Mr. Cotter.

Mr. COTTER. Yes, your honor.

Q. Did you see Mr. Booth speak with one of the officers at that time or immediately afterwards?

Mr. HOAR. Excuse me, Mr. Cotter.

Mr. COTTER. I asked him if he saw Mr. Booth speak with one of the bailiffs (I called him one of the officers)—one of the bailiffs.

162 Q. Immediately or within a short time after your attention was called to the paper.

A. I did not, sir.

Q. Before this case was finally submitted to the jury, did the juror, Briggs engage in conversation with you, or in your hearing, in reference to the defendant?

Mr. HOAR. I object.

COLT, J. Mr. Cotter, the court determines to exclude the evidence—the conversation between one of the jurors and another juror as to matters which took place in the jury room.

Mr. COTTER. It is understood, if your honors please, that this was before the case was finally submitted to them.

COLT, J. I under-stand that—we understand that.

Mr. COTTER. Yes; after the court had advised the jury not to engage in any discussion. And we will ask your honor to note our exception to the exclusion.

COLT, J. The stenographer will note the exception.

PATRICK H. CONCANNON, sworn:

Q. (By Mr. COTTER.) What is your name in full?

A. Patrick H. Concannon.

COLT, J. A little louder, please.

A. Patrick H. Concannon.

Q. (By Mr. COTTER.) What is your business?

A. Printer.

Q. Where do you live?

A. 48 Mt. Auburn st., Cambridge.

163 Do you know Oliver J. Briggs?

A. I do, sir; I have known him for eight or ten years.

Mr. COTTER (addressing witness). Keep your voice a little higher.

A. I do, sir; I have known him eight or ten years.

Q. You meet him frequently?

A. Yes, sir.

Q. Do you almost daily?

A. Well, no; probably two or three times a week; some weeks would not meet him at all.

Q. Do you frequently dine together?

A. We have, sir.

Q. Before the 14th of December did you have a conversation with Mr. Briggs in relating to this case of Thomas M. Bram?

A. I don't remember that I had, sir.

Q. Were you present when he engaged in conversation with someone about the case?

A. Not to my knowledge; I don't remember his ever making any statement on the case.

Q. Have you met together up at a restaurant kept by one Tomfohrde on Court st.?

A. Yes; we have met there.

Q. Can't you recall a conversation had with you or in your presence by Mr. Briggs, in which Mr. Briggs took part, about this case, the case of Bram.

A. I do not, sir.

164 Mr. HOAR. When, might we ask you?

Mr. COTTER. Well, I am asking.

Q. If any time before?

A. I never remember of Mr. Briggs making any statement in front of me.

Q. In front of you?

A. Yes, or in my presence.

COLT, J. (To the clerk of the court.) Where is that affidavit?

Mr. HOAR. The clerk has it, I suppose—the affidavit.

COLT, J. Is that in the affidavit?

Mr. HOAR. No, sir; no, sir.

Q. (By Mr. COTTER.) Have you stated within three weeks, Mr. Concannon, that you did hear Mr. Briggs make a statement in regard to Bram?

Mr. HOAR. Can he go into a cross-examination of his own witness?

Mr. COTTER. I am refreshing his recollection.

A. I don't remember any such statement.

Q. Are you positive you did not make such a statement?

A. I would not be positive, but I don't recollect any such statement.

Q. Might you not have made such a statement?

A. Possibly, but not to my recollection.

Q. If you made such a statement, is it true?

WEBB, J. One moment, Mr. Cotter. We allowed you to go far enough with your own witness on that.

165 Mr. COTTER. I may say, your honor, that I am aware we are taking some liberty.

* * * * * * *

Q. Well, I will put this question: Do you remember of saying within three weeks, "Oliver Briggs ought not to have served on that jury. I

was surprised when I found he had served there in consequence of the talk that we had."

A. I don't remember any such statement.

Q. Might you not have made such a statement, in substance?

* * * * * * *

WEBB, J. (To witness.) You may give your recollection.

A. I don't remember making any such statement.

Mr. COTTER. Yes.

* * * * * * *

Q. How positive are you that you did not say that, in substance?

A. I am pretty positive that I never made no such statement.

EDGAR O. BEAN sworn.

Q. (By Mr. COTTER.) What is your name in full?

A. Edgar O. Bean.

Q. Bean?

A. Yes, sir.

Q. And where do you live?

A. I live in Somerville, Mass.

166 Q. What is your business?

A. I am a reporter on the Boston Journal.

Q. Do you know Oliver J. Briggs?

A. I do.

Q. Did you see him on or about the 2d day of January?

A. Yes, sir.

Q. Of this month?

A. Yes, sir; I saw him in the evening.

Q. Where did you see him?

WEBB, J. Of which day?

Mr. COTTER. The second.

WEBB, J. You said, "or, or about."

Q. What evening was that?

A. Saturday, January 2d, 1897.

Q. About what time?

A. I saw him at his home in Cambridge between ten and eleven o'clock.

Q. And was anyone with you?

A. Well, I went to the house alone, but I met another reporter there, who had preceded me.

Q. Do you know his name?

A. Yes, sir.

Q. Give it to us.

A. John Whorisky.

Q. John Whorisky?

A. Yes.

Q. Was Mr. Briggs there when you went to the house?

167 A. Not when I called; no, sir.

Q. Did you see him that night?

A. I did, sir.

Q. Where?

A. I saw him in the sitting room of his own house.

Q. Did you have a conversation with him in relation to this case?
A. I did, sir.
Q. And did you make notes?
A. I made some notes; yes, sir.
Q. Yes. Now, you may state what was said by Mr. Briggs in relation to this case.
Mr. HOAR. I object.

* * * * * * *

Mr. COTTER. If he goes on to state the attitude of the jurymen as bearing upon his bias at the time that he was called, so long as we have some evidence—and we have some evidence that he made a declaration of bias before——
WEBB, J. I think, Mr. Cotter, your questions should be more distinct, brought down near to some specific subject without leading.

* * * * * * *

WEBB, J. That is too broad.
Q. State what was said by Mr. Briggs as to his views of the case before it was fully submitted.
Mr. HOAR. No; I object to that.

* * * * * * *

168 WEBB, J. If he said anything in regard to his views or opinions of his determination prior to being put on the jury we will allow you to do that. We have once gone over that matter. But your question is asking what he said as to his frame of mind or disposition in the case prior to serving or being sworn as a juror.
Mr. COTTER. If your honor so limits it we submit. You will allow our exceptions.
WEBB, J. I do not think you are entitled to an exception at this stage of the case, but you may make a memorandum that you claim it, and if you are entitled to it you will be protected.
Mr. COTTER. Yes. In order to avoid any possible misunderstanding and so that there will not be any difficulty about the exception, your honors—of course we are not making any statement before the jury now—I will state that we expect to show, that I expect he will testify, that on this night he saw the juror, and that the juror made manifestations of wrath and anger; that he said he desired to be present at the hanging of the defendant, and wished to knock the blocks away from under his feet; that his mind was made up for about a week. I may not have the language exact. That is the substance of what we will show.
The district attorney was allowed to read to the court the stenographic report, as follows, of the said juror Briggs's examination upon his voir dire:
169 "Are you related to the prisoner at the bar, or to the deceased captain, Charles I. Nash?
"A. I am not.
"Q. Have you any interest in this case?
"A. No, sir.
"Q. Have you formed or expressed any opinion in relation to it?
"A. No.

"Q. Are you sensible of any prejudice or bias in relation to it?
"A. No, sir.
"Q. Have you any opinion which precludes you from finding a prisoner guilty of an offence punishable with death?
"A. I have not.
"COLT, J. Any questions by anybody?
"Mr. HOAR. I have none.
"Q. (By Mr. COTTER.) What is your business?
"A. Carpenter and builder.
"Q. And your place of business?
"A. Cambridge.
"A. Are you doing business on your own account?
"A. I am.
"Q. How long have you lived in Cambridge?
"A. About fourteen years.
"Q. In what part of Cambridge?
"A. North Cambridge, Harvard Square; up around that way.
170 "Q. Have you read the newspaper reports of this case?
"A. Partially.
"Q. Have you formed any opinion from your reading of them?
"A. No, sir.
"Q. None that would interfere with your following the evidence?
"A. No.
"Mr. COTTER. We accept him.
"The customary oath was administered to the juror in regard to the performance of his duty.
"This ended the examination of the voir dire."

* * * * * * *

COLT, J. We will hear you further if you have anything to say.
Mr. COTTER. I do not think of anything further, if your honor please.
COLT, J. We will hear Mr. Hoar then.
Mr. HOAR. I wish at once to call attention to the fact that this moment the defence has filed an affidavit in this case of the very witness that they have just had on the witness stand. Now, I wish to call your honor's attention to the fact——
Mr. COTTER. We have not offered that affidavit, and we have made no comment upon it.
COLT, J. Has the affidavit been filed?
Mr. COTTER. Yes, your honor.
Mr. HOAR. It has just this minute been filed. I will agree
171 with Mr. Cotter that I will not comment on it, but I want your honors to understand now that an affidavit of this witness has been filed, and if it is not offered in evidence I want your honors to know it so that I may have an opportunity to discuss that affidavit when the proper time comes.
COLT, J. We have admitted in this case the affidavit of Mr. Connell as to what one of the jurors said previous to the trial of the case, which would relate to the question of whether he had prejudged the case or not. Any further evidence which relates to what the juror said previous to the trial will also be received by the court, but any expression of opinion after the trial that any of the jurors may have made to third parties, as

to his state of mind during the progress of the trial, or as to his state of mind at the conclusion of the trial, the court will reject upon grounds of public policy.

Mr. COTTER. We will ask your honor to save our exception.

COLT, J. The exception may be noted, the same as the other exception was noted.

Mr. COTTER. Without discussing it, if your honor please, I have in my hand now the affidavit that the district attorney alluded to, and I submit that it is setting forth substantially what I stated——

COLT, J. Will you pass it to the court?

The affidavit was passed to the court, a copy of which affidavit is as follows:

172 [Caption omitted.]

Affidavit of Edgar L. Bean, of Somerville, in the county of Middlesex, in said district, in the above-entitled prosecution:

I, Edgar L. Bean, of Somerville aforesaid, being of full age, on oath depose and say: That I know Oliver J. Briggs, one of the panel of petit jurors which returned a verdict in the above-entitled prosecution; that since the trial and on the day of the rendering of the verdict aforesaid, to wit, on or about the second day of January, 1897, I had a conversation with the said Briggs at his house, during which he said: "My mind was made up a week ago; in fact, I thought right along that he was guilty. I should like to see him hung; I should like to be present at the hanging and be the one to kick the block from under his feet."

I made notes of the interview and referred to them before making this statement. On the occasion of my said interview with Briggs, I represented the Boston Journal, and so stated to him. A representative of the Boston Globe was with me at the time.

The foregoing was read to and understood by me before signing.

(Signed) EDGAR L. BEAN.

DISTRICT OF MASSACHUSETTS:

The above was duly sworn to on the twentieth day of January, A. D. 1897.

173 Mr. HOAR. I desire to object. I have read the affidavit, and I desire to object to it under the ruling that the court has just made.

COLT, J. After the ruling which the court has just made we must decline to receive this affidavit.

Mr. COTTER. We will ask your honor to note the exception.

COLT, J. The stenographer will note the exception.

WEBB, J. In the noting of the exception let it appear that the affidavit is from the witness who has just been called, from whom it was sought to obtain evidence of this sort upon the stand, and the affidavit was only offered after the court had held that the evidence was inadmissible.

Mr. COTTER. I will state, and should like to have it appear, that the affidavit had been filed previously.

WEBB, J. It appears that the affidavit was filed while the question of the admissibility of the evidence was under consideration by the court.

174 FRANK P. COLLINS, sworn.

Q. (By Mr. COTTER.) What is your name?
A. Frank P. Collins.
Q. And do you reside in Boston?
A. I do.
Q. What is your business, Mr. Collins?
A. I am a reporter of the Boston Journal.
Q. Did you see that paper?
A. I did.
Q. And where did you first see it?
A. In the Hotel Savoy, Washington street, Boston.
Q. When?
A. On Saturday evening that the verdict was returned.
Q. In whose hands was it?
A. When I first saw it, it was in Mr. Booth's hands.
Q. Did you take a copy of it?
Mr. HOAR. I object.
WEBB, J. That paper does not purport to be a copy, does it?
Mr. COTTER. No, if your honor please. Well, I will go still further.
Q. You said it was in Mr. Booth's hands, I think?
A. It was when I first saw it.
Q. And did you call my attention to that paper?
A. I did.
Q. And when?
A. The Sunday morning following.
175 Q. And did you have with you a copy of the paper at that time?
A. I did not.
Q. Did you show me a copy of the paper?
A. I did not.
Q. Some time later?
A. Later I did.

WEBB, J. One moment, before that witness retires; there may be a misapprehension on the part of the court. You were asked if you saw that paper. Did your answer apply to that little slip which is attached to the affidavit there or to the whole paper?

The WITNESS. I saw this little slip.

WEBB, J. The whole paper, affidavit, or whatever it is, was passed to him——

The WITNESS. I only saw this small slip of paper.

JAMES C. RUHL, sworn.

Q. (By Mr. COTTER.) What is your name, Mr. Ruhl?
A. James C. Ruhl.
Q. And you are a deputy of the marshal's?
A. I am a bailiff.
Q. And you were one of the bailiffs who had charge of this jury?
A. Yes, sir.
Q. Did Mr. Harrington assist you?
A. Yes, sir; he was one of the assistants.
176 Q. And did he go to and from the jury room with the jury?

A. Yes, sir.
Q. You understood me to refer to Harrington, did you not?
A. Yes, sir.
Q. At any time was your attention called to that piece of paper?
A. Yes, sir.
Q. By whom?
A. By Mr. Booth.
Q. A juror?
A. Yes, sir.
Q. When was it, if you please?
A. Well, I think it was about the second week of the trial; I should say probably a couple of days before Christmas. It was in the second week of the trial, I think.

ISAAC C. HARRIS, sworn.

Q. (By Mr. COTTER.) Your name in full?
A. Isaac C. Harris.
Q. And where do you live?
A. Cambridge.
Q. And your business?
A. Builder.
Q. And your place of business?
A. 574 Massachusetts avenue.
Q. And do you know Oliver J. Briggs?
A. Yes, sir.
Q. Been acquainted with him for some time?
A. 14 years.
177 Q. Do you meet him frequently?
A. Meet him about every morning.
Q. And sometimes in the middle of the day?
A. Most any time we run across one another.
Q. Now, before the beginning, the commencement of the trial of the case of the United States *v.* Bram, did you meet him frequently?
A. Met him every day; about every day.
Q. Did you have a talk with him about the case?
A. No, sir.
Q. Nothing said about the case?
A. Nothing about this case.
Q. The United States *v.* Bram?
A. No; not at that time.
Q. Before the trial, then?
A. Before the trial there was only one thing that I heard Mr. Briggs say in my office one morning when he was drawn on the jury first, and I guess it was——
Q. My inquiry was limited to the case of the United States *v.* Bram.
A. No; before he was ever drawn on the jury of Bram at all, on the petit jury, or whatever it was, he came to my office and said, "I have been drawn on the jury, I see, on the panel." About a week afterwards we got talking, and then he commenced to speak about he was afraid he would be drawn on this Bram jury, and then he said, "I don't care about getting on it, and I shall try to get off of it if I can."

178 Q. Anything said about any opinion?
A. Not anything.
Q. At any time?
A. At any time.

EDWARD P. BARRY, sworn.

Q. (By Mr. COTTER.) What is your name in full?
A. Edward P. Barry.
Q. Where do you live?
A. 154 Dorchester street, South Boston.
Q. What is your business?
A. I am a reporter for the Boston Herald, and editor and publisher of the South Boston Inquirer.
Q. Are you acquainted with Oliver J. Briggs?
A. I have met him; yes, sir.
Q. Did you meet him before the trial of the case against Bram?
A. No, sir.
Q. Were you present when he engaged in any conversation?
Mr. HOAR. When?
Mr. COTTER. Before the trial.
A. No, sir.
Q. Have you engaged in conversation with Mr. Briggs—I will not ask for the conversation—have you engaged in conversation with Mr. Briggs in relation to this case? In relation to the case against Bram?
A. I have; yes, sir.
179 Q. When was that?
A. After the trial.
Q. And where?
A. Must I answer? At the Quincy House.
Q. Can you give us the date?
A. The day the verdict was brought in; Saturday.
Mr. COTTER. Then, I do not care to do—if it is acting in violation or in conflict of any order of the court—I will say that I have not seen this witness, but I am advised that his testimony would be in the same line substantially as that set forth in the affidavit of the witness Bean?
WEBB, J. The same as set forth in the affidavit we refused to receive. The same as you offered to show orally from Bean?
Mr. COTTER. Yes, your honor.
Mr. HOAR. I object.
COLT, J. I think, Mr. Cotter, in order to preserve your full rights you may propound any question you wish, and then the court will reject it, and you can save your exception. You will not answer (addressing the witness). I mean we will rule upon it after the question is asked.
Q. And what time in the day or evening was that, Mr. Barry, that you saw Mr. Briggs at the Quincy House?
A. From 5.30 to 8.30 o'clock.
Q. Was anybody else present?
A. Yes, sir.
Q. You may state who?
A. Juror Burke, Mr. Warren T. Billings, of the Herald, and Mr. Hill, of the Herald; Mr. Jack we saw there for a few moments.

180 Q. And in what part of the hotel did the conversation take place?

A. First in the cafe, and afterwards in one of the private dining rooms.

Q. In that conversation, did Mr. Briggs state what his views of the case were before he was drawn on the jury?

A. I think he said he had——

Mr. Hoar. What——

Webb, J. That question can be answered yes or no.

Q. Answer yes or no.

A. Yes.

Q. Now I will ask you what he said with regard to that?

Webb, J. With regard to his state of mind prior to the trial?

Mr. Cotter. Yes.

The Witness. Not with regard to the state of his mind; he merely said that he had read the trial and followed it closely.

Colt, J. Read the trial?

The Witness. Read the evidence as it was presented in the newspapers previous to the trial.

Q. Did he state anything about any conclusion or view of his?

Colt, J. Previously?

A. Not previously; I didn't talk with him previous to the trial.

Webb, J. For my own information, merely, what report of this evidence was there prior to the trial?

181 The Witness. The story of the crime, the news reports.

Q. Whether or no he stated what impression that made on him—his views on the case—on this occasion?

Webb, J. Now, you must be very careful. The witness should be instructed to confine his answers to what he said about his feelings or state of mind or action prior to the trial, and, having been so cautioned, he should then be permitted to tell what he said, and all he said, and who else took part in it, and how it was called out.

Mr. Cotter. Yes, your honor; I mean that he shall have that opportunity.

The Witness. I can't remember the exact language, because we talked for a good many hours.

Q. Well, state the substance of it.

A. He didn't——

Colt, J. You understand the question, don't you?

The Witness. Yes, sir. In substance he said he was satisfied from what he read before that the prisoner was guilty, but he didn't say—he said he felt as if he could try the cause in his mind honestly and give him the benefit of any doubt—he didn't say that he had determined——

Q. State what he said; that is what we want.

Webb, J. He is not attempting to state what he said at all. He is giving the substance. You said you talked two hours?

The Witness. We talked two hours or three hours.

Mr. Cotter. What we object to is his calling attention to what
182 he says he did not say. It might take a long time for him to do that.

Q. I shall ask to have you state, if you can not give the exact words, to give the substance of what he said on the subject as indicated by the court?

A. It would be a pretty difficult thing to do. I didn't take any notice; it was a general conversation in which five participated, and I can only give the impression that it left on my mind, that is all.

Q. Well, give the substance of what was said.

A. I say I can't.

Q. Well, your best recollection of it.

A. I think Mr. Billings asked him, as near as I can recollect, why he went on the jury.

WEBB, J. Who asked him?

The WITNESS. Mr. Billings, who was one of the Herald men with me; and said that it must have hurt his business a great deal to leave it during the time it was necessary to do the jury duty. He said, yes, it did, and he was not so very anxious to go on, but he was drawn, and I am quite sure that he said that when Mr. Cotter asked him whether or not he had formed any opinion, he said he had. That was something that was left very strongly impressed upon my mind, because—he was not directing his conversation to me at the time—I was talking with Mr. Burke at the time—he was directing his conversation to Mr. Billings—that was the impression I got in overhearing the conversation with Mr. Billings; we were all talking with each other in a general way,
183 sitting around the table. I didn't ask him whether or not he had said that——

Mr. HOAR. Not what you didn't do. We would like to know what was done.

The WITNESS. But that was the impression I got—entirely an impression. I wouldn't say that it was so for a certainty.

Q. Did he state his views of the case or of the defendant afterwards, after he came on the panel—any views that he formed?

Mr. HOAR. I object.

COLT, J. Excluded and exception saved.

The WITNESS. If the court will allow me, the Boston Herald——

Mr. HOAR. I object.

WEBB, J. Well, let us hear what this man has to say in the way of his own personal explanation.

The WITNESS. The Boston Herald's attorney was here, Mr. Henry V. Cunningham, to make an explanation of what occurred, on behalf of those who conversed with the jurymen on that occasion. They held that the conversation was of a private nature, which, of course, the attorney advised me to tell, so far as the court permitted, but in conversing with the gentlemen we conversed as friends—with the jurors—we conversed as friends, and we felt that anything, and assured them that anything, that would be said that they wanted published would be published, and anything that was said that they didn't want published wouldn't
184 be published; and we carried out that part of the agreement, and we agreed that everything that was said that was not published was of a private nature, and, as newspaper men, we kept our agreement.

Q. Yes; and for that reason you didn't care to talk with counsel?

A. No, sir; I wouldn't talk with counsel.

Mr. COTTER. I assigned that as a reason for not being able to get more definite information.

COLT, J. Have you any further questions?

Mr. COTTER. No, sir.

Q. (By WEBB, J.) I understand you to say that that conversation lasted for several hours?

A. Yes, sir.

Q. Did any others take part in it?

A. There were five there, and one of them I have known since childhood.

Q. Were there any other parties there besides those five? Did any by-standers take part in it?

A. Oh, we were in a private room; we were having a little lunch in a private room. We talked down in the cafe with Mr. Sinclair, the proprietor of the house, but not on the case at all.

185 JOHN B. WHORISKEY sworn.

Q. (By Mr. COTTER.) What is your full name?

A. John B. Whoriskey.

Q. (COLT, J.) Please spell the last name.

A. (The witness spelled the name letter by letter.

Q. What is your business?

A. Reporter on The Globe.

Q. Do you know Oliver J. Briggs?

A. I have met Mr. Briggs.

Q. Have you seen him in reference to the case of The United States vs. Bram?

A. I have.

Q. Where did you see him?

A. At his home, Lakeview ave., Cambridge.

Q. Were you there on the occasion described by the witness Bean?

A. I was.

Q. Did you see Mr. Briggs?

A. I did.

Q. Did you engage in conversation with him?

A. I did.

Q. Did he say anything to you in regard to the defendant, or his views of the defendant, or his knowledge of the defendant's case before he was impanelled on the jury?

A. He spoke——

186 Mr. HOAR. No, I think that is capable of an answer, yes or no.

COLT, J. He may answer yes or no.

Q. Did he say anything in respect to his views of the case before the trial, before the 14th of December?

A. I am uncertain as to whether he referred to it before the trial or not.

Q. Will you try to refresh your recollection as to whether he said anything about his condition of mind or his views of the case——

WEBB, J. One moment. What is the date of this?

Mr. COTTER. December 14.

COLT, J. That is the date of the trial.

WEBB, J. January 2, between ten and eleven o'clock at night, is the time Mr. Bean spoke of.

Mr. COTTER. Yes.

WEBB, J. Following the delivery of the verdict.

Mr. COTTER. Yes.

A. He did.

Q. Will you state what he said?

A. He spoke of Bram's record.

Q. What did he say about it?

A. He asked me if I knew Bram's record. I answered that I did not.

Q. (By COLT, J.) Are you confining yourself now to the juror's view before the trial?

Mr. COTTER. Before the 14th.

187 Mr. HOAR. Before the beginning of the trial.

COLT, J. Before the beginning of the trial.

The WITNESS. I am referring to the evening of January 2nd.

Mr. COTTER. What he said in regard to his view before the trial.

Q. (By COLT, J.) Did he say anything in regard to his views before he went on the jury?

A. No; he did not. I misunderstood the attorney. No; he did not.

Mr. COTTER. I may say to your honors, to save time, that I expect this witness, and have positive knowledge in regard to this witness, that his testimony covers matters we offered to show by Mr. Bean.

Mr. HOAR. Have the question asked.

COLT, J. You better ask the question and have it ruled upon.

Mr. COTTER. Yes; very well.

Q. Did he say anything in regard to his views of the case before the case was submitted to the jury?

Mr. HOAR. I object.

COLT, J. Excluded.

WEBB, J. Well, that question—I do not suppose that any of us misunderstand what is meant, but the question is not definite. The phrase "before the case was submitted to the jury," covers a great deal of time, but it means during the progress of the trial.

Mr. COTTER. Yes, sir.

* * * * * * *

188 Q. Did he state to you what his views were concerning the defendant, Bram, or what he did before the case was finally submitted to the jury?

Mr. HOAR. I object to that.

COLT, J. You need not answer. The question is excluded and exception noted.

Mr. COTTER. For the validity of our exception we wish to have it appear on the record what we propose to show at this time. We propose to show that the juror did state, at least a week before, that he was satisfied that this man ought to be hung; that he should like to be present at the execution and be the person to kick the block away from this man's feet.

COLT, J. In substance what was included in the affidavit?

Mr. COTTER. Yes, precisely. That is what I say, your honor.

WEBB, J. Let me see that affidavit.

(Paper handed to Judge Webb.)

COLT, J. The stenographer will take note of that.

WEBB, J. Now, Mr. Cotter, your statement does not correspond with this statement. Of course, it is subject to an interruption that would make it correspond. This statement (referring to paper) does not show that at the time during the trial he concealed that he wished to see him hung; that he spoke of his guilt, seemed to desire to see him hung; that that was his then present sentiment. That may have been stated in some other proceeding. Now, if you undertake to offer to show to prove that he thought that all along—that the man was guilty and ought to be
189 hung—and if he said he thought that all along, that is one thing. That ought to be stated clearly. The ambiguity is to be avoided.

* * * * * *

Q. Did the juror state in that conversation, if at all, when he thought the defendant was guilty?

Mr. HOAR. I object.

COLT, J. Excluded. That can be answered. I will withdraw the objection.

The WITNESS. Read the question.

COLT, J. Will the stenographer read the question?

(The stenographer repeated the question.)

Mr. HOAR. That can be answered yes or no. (After a prolonged pause.) I should like to have the hesitance of the witness appear on the record.

* * * * * *

COLT, J. The witness may take all the time he desires before answering. Take any reasonable time. You understand the question, do you not?

A. I think I do; yes. Not in so many words.

Mr. HOAR. Well——

Mr. COTTER. Well, I will ask you to state the word, but do not answer until the court passes on it.

Mr. HOAR. I will object to that.

WEBB, J. We will hear the question before we rule upon it.

Q. (By Mr. COTTER.) What words did he use in relation to that subject—the subject of the last question.

COLT, J. What question?

190 Mr. COTTER. That last question, desiring to see the defendant hung.

WEBB, J. That was not the question.

Q. (By Mr. COTTER.) What did he say in regard to his conclusion as to the guilt or innocence——

WEBB, J. The question is, did he tell him at what point——

(The question was repeated by the stenographer.)

WEBB, J. As to the time.

Mr. COTTER. Yes, as to the time; state what he said, giving the time, and also what he said in regard to the guilt of the defendant.

Mr. HOAR. I think I shall be obliged to object to that.

WEBB, J. That is not quite in form.

Mr. COTTER. Very well.

Q. What did he say as to the guilt of the defendant——

Mr. HOAR. I object.

COLT, J. Excluded.

Mr. COTTER. I understand your honor has excluded the whole of it?

WEBB, J. No; we allowed as to the point of time.

Mr. COTTER. However, for the purpose of saving the law so that there will be no misunderstanding here, I will ask it again.

Q. Did he state when he first formed an opinion as to the guilt of the defendant?

* * * * * * * *

191 The WITNESS. Not to the day.

Q. Did not state the day? Well, did he as to the time?

Mr. HOAR. Answer yes or no.

A. He did.

Q. When was that in reference to the verdict?

* * * * * * * *

A. It was before the verdict.

Q. Did he state how long before the verdict?

* * * * * * * *

COLT, J. You may answer that question without stating the conversation.

A. He did.

Q. You may state what it was.

A. Within a week.

WEBB, J. He did not fix it.

Mr. COTTER. Within a week, he says.

WEBB, J. Within a week?

Mr. COTTER. Yes.

Q. Did he say anything in regard to newspaper reports before?

WEBB, J. Well——

Q. Did he say anything in regard to his condition of mind before, and how his mind was affected from the reading of newspapers or other reports?

A. Not to my knowledge.

* * * * * * * *

192 Q. (By Mr. COTTER.) What did the jurors say; what did Mr. Briggs say, if anything, in regard to being present at the execution or the hanging of the defendant?

Mr. HOAR. I object.

COLT, J. Excluded and exception.

EDWARD P. BARRY, recalled.

Q. (By Mr. COTTER.) Were you coming up on the elevator with Juror Briggs sometime during the progress of the trial?

A. I was not.

Q. You were not?

A. No.

RINALDO A. JACK, recalled.

Q. (By Mr. COTTER.) Mr. Jack, after the jury was empanelled in this case, was a physician called to attend any member of your panel?

A. Yes, sir; there was.
Q. When?
A. I think it was the Sunday after Christmas.
Q. And where did the physician attend the juror?
A. At the Quincy House.
COLT, J. A little louder, please.
The WITNESS. At the Quincy House.
Q. Do you know who the physician was?
A. I do not, sir.
Q. And which juror did he attend?
A. Mr. Green.

* * * * * * *

193 Q. After the jurors left the court room on one of the days when the defendant was on the witness stand, did the juror Briggs engage in conversation in regard to the defendant?

Mr. HOAR. I object.

WEBB, J. The question is, with whom, whether he was engaged with one of his fellows, that is one thing.

Mr. COTTER. Yes, he did, with some of the jurors, your honor.

Mr. HOAR. I object.

COLT, J. With one of his fellow jurors?

Mr. COTTER. With one of his fellows, one or more.

COLT, J. Excluded.

Mr. COTTER. Note the exception.

Mr. COTTER. And I wish to state here to the court, so that it will appear on the record what we propose to show. I will do that, or put a specific question to the witness, as your honors may direct.

COLT, J. You had, perhaps, better ask the question, Mr. Cotter.

Q. Did the juror Briggs say that he himself was a Freemason and that the defendant was not?

Mr. HOAR. I object.

WEBB, J. One moment—you have left out the qualifying part of that question.

Mr. COTTER. Yes; to the juror.

WEBB, J. To one of the other jurors.

COLT, J. Do you object, Mr. Hoar.

194 Mr. HOAR. I object.

COLT, J. Excluded.

Mr. COTTER. We ask that the exception be noted to that.

Mr. HOAR. I object on another ground. I object to the form of the question.

WEBB, J. You need not trouble about amending the form. We exclude the evidence without regard to the form.

Q. Did the juror Briggs state to you or to other of the jurors, "The defendant is a hypocrite?"

Mr. HOAR. I object.

COLT, J. Excluded.

Mr. COTTER. And we except.

Q. Did the juror Briggs state to you or any of his fellows in your presence before the case was finally submitted to the consideration of the jury, "I should like to see that man hung?"

Mr. HOAR. I object.

COLT, J. Excluded.

Mr. COTTER. And we except.

Q. How long was this physician with the juror, Mr. Green?

A. I should judge he was there ten or fifteen minutes alongside of him with the officer in charge.

Q. Did he leave anything with the juror—hand him anything?

A. Not anything at all in my presence.

Q. Were you present all the time?

A. I was there in the room; I was right around there where they were.

195 Q. Were you giving any attention to the juror and the physician?

A. I was listening to what the remarks of the doctor were, that is all.

Q. Were you giving any special attention to what transpired between them?

A. No, sir; I was not.

Q. Might there not something have passed between them without your noticing it?

WEBB, J. Are you cross-examining your own witnesses?

Q. Were you in a position to see and did you see all that took place between them.

A. I was in a position to see all that took place.

Q. Yes, and did you?

A. I was standing right by there; yes, sir.

Q. What special attention, if any, were you giving to them, if any?

A. Well, I was a little mite interested to find out what the matter was with him.

Q. And did Mr. Harrington assist the bailiffs in taking care of the jury? You know to whom I have reference.

A. At the hotel?

Q. Here or anywhere?

WEBB, J. He was one the bailiffs of the Government and sworn to attend them.

Mr. COTTER. We merely wish to show that he did act and that he was sworn.

196 WEBB, J. The record shows that he did.

* * * * *

Q. You may state what Mr. Harrington did in the way of aiding or caring for the jury.

A. Well, he accompanied us from the jury room to the hotel—to the hotel office, and left us in the office. He did not go into our jury room at all—to our quarters.

Q. Did he go up to the jury room up stairs?

A. No, sir; I never saw him there.

Q. Did any of the officers go into your jury room—I mean at any time?

A. Well, which do you refer to; our sleeping room or the dining room?

Q. No; I mean the rooms in this building.

A. In this building?

Q. Yes.
A. No, sir; only when we were at lunch.
Q. How frequently did they join you at lunch?
A. About one o'clock.
Q. Every day?
WEBB, J. He asked you how often.
A. They were there every day at lunch at one o'clock. They had their lunch with the jury.
Q. And what officers?
A. Mr. Ruhl and Capt. McGonagle.
Q. Anybody else?
197 A. I think Mr. Macdonald—Marshal Macdonald.
Q. After the case was submitted to you for your final consideration, and before you returned the verdict, did you dine with the officers?
A. When we took the case to the jury room, we dined before we had anything to do with any part of the case at all.
Q. Were the officers with you?
A. They were there at lunch. We done nothing with the case until the officers and everyone was out of the jury room.
Q. My question was, did the officers sit down at the same table with you to eat?
A. They sat down at the same table to eat in the jury room.
Q. Did they after you began to deliberate on the case?
A. No, sir.
Q. Didn't they afterwards? Didn't you have a meal on the following day?
A. Not until the verdict was delivered.
Q. The case was given to you on Friday about one o'clock. You had dinner immediately upon retiring to your room?
A. Yes, sir.
Q. Before you began to consider the case?
A. Yes, sir.
Q. Then didn't you have some supper that night—Friday night?
A. Yes; I think we had a lunch there; yes.
Q. Well, were the officers present?
198 A. I don't know but they were; I could not swear to it.
Q. What is your best recollection, Mr. Jack?
A. Well, I could not say.
Q. You mean that you have no recollection on that?
A. I do not recollect whether the officers were there that night or not.
Q. How was it the following morning when you had breakfast?
A. Well, I could not say whether they ate with us that morning, or whether they had their breakfast taken out to them. I could not swear to it because I did not take any note of it.
Q. Have you any recollection whatever?
A. No; I have not.

WARREN M. BLAKE, sworn:

Q. (By Mr. COTTER.) Your name in full, Mr. Blake?
A. Warren M. Blake.
Q. And you were one of the jurors?

A. I was.

Q. Now, do you remember after the case was submitted to you on Friday, the first of January, when you went to your jury room and had lunch or dinner, whether the officers joined you?

A. I think they did the first meal; I am quite sure they did.

Q. And any officers other than the two bailiffs?

A. I think the deputy marshal, the large man, I think his name is Macdonald.

199 Q. Mr. Macdonald?

A. Mr. Macdonald; I think he was in there.

Q. Now, do you remember at what hour supper was served that night?

A. No, sir; I do not.

Q. Was that served in the jury room?

A. Yes, sir; I think it was.

Q. And were there any other people present than the officers?

A. I don't remember that.

Q. And did the officers join you that night at supper?

A. I could not say whether they did or not. I don't remember about that. I sat in the middle of the table, and I did not take much notice about that. I could not really say.

Q. Well, have you any recollection as to whether the officers joined you afterwards—I mean except on this one occasion, Friday, about the noon hour—that is, after the case was given to you, between that time and the time you returned your verdict the officers were with you in the room?

A. I don't remember that they were at any other time; they might have been.

Q. Do you mean to say that you have no recollection on it?

A. I have no recollection as to that point.

Q. And do you remember the occasion when the physician was called in?

A. I do; yes, sir.

200 Q. And how near were you to Mr. Green at that time?

A. Well, Mr. Green, I think, was lying on some chairs—a sort of improvised couch—near the radiator as you went into the door, and I sat there in the middle of the room. It was quite a long room. I was reading, I think, at the time the doctor came in.

Q. What attention, if any, were you giving to what transpired or occurred between Mr. Green and the doctor?

A. I gave no special attention, except glanced up now and then.

JAMES C. RUHL, recalled.

Q. (By Mr. COTTER.) Mr. Ruhl, did you report to either the defendant or any of his counsel that you saw or knew anything about the paper that I called your attention to this morning on the stand?

A. No, sir.

Q. Now, after this case was submitted to the jury on Friday I wish to know if you and the other officials—you and your associates—were present when the jurors took their meals?

A. Yes, sir; every meal.

Q. And what persons were present?

A. Officer McGonagle, Deputy Marshal Macdonald, and myself.

Q. And in the jury room?

A. Yes, sir; and also the two waiters.

Q. (By WEBB, J.) Two what?

A. Two waiters.

201 Q. (By Mr. COTTER.) Did you sit at the same table with the jurors—two waiters?

A. Yes, sir.

Q. Where did the waiters come from?

A. The Quincy House.

Q. How many meals were served between the time the case was finally submitted to the jury on Friday—that is, about one o'clock—and when they reported into court, when they returned their verdict?

A. There was dinner and supper and breakfast.

Q. There were three meals?

A. Yes, sir.

Q. And were all these persons whom you named present at these meals?

A. Not all the time. I could not swear that Mr. Macdonald attended the last meal. The waiters went out in the corridor there. The waiters provided the meals and set them on the table, and then we asked them to step out.

Q. Did the waiter enter the room where the jury were?

A. Yes, sir. He had to do it in order to get the stuff out of there and to put it in there. That was the only way.

Q. How many times did he visit or enter that room?

A. I should say during the three meals once each time.

Q. He went in to prepare *the* serve the meals?

A. Yes, sir; and to take them out.

202 Q. How long did he stay there on each occasion—the two of them? I believe there were two of them.

A. I could not say; probably fifteen minutes—fifteen minutes to half an hour.

Recross-examination:

Q. (By Mr. HOAR.) Mr. Ruhl, did you report the fact about that little slip of paper to anybody in connection with my office?

A. No, sir; I did not until last Tuesday, I think it was.

Q. Last Tuesday?

A. Yes, sir.

Q. Were the officers in the jury room all the time the waiters were?

A. Yes, sir.

Q. Was there any communication between the waiters and the jurymen?

A. No, sir.

Mr. COTTER. We desire to object to that.

WEBB, J. On what ground?

Mr. COTTER. We claim, if your honor please, the significant fact is that strangers, or foreigners—people, I do not mean under the sense of another nationality, because that might apply to me, but people who did not belong in that jury room—that they were there.

WEBB, J. The Government may show just what happened, you having opened the matter.

203 COLT, J. Whatever happened between the third parties and the jurors we have admitted, and we think it proper for the Government to show what happened. Do you object to the question?

Mr. COTTER. Yes.

COLT, J. Very well.

Mr. COTTER. Be good enough to note our exception, that our rights may be saved.

JOHN B. WHORISKEY, recalled.

Q. (By Mr. COTTER.) Mr. Barry, you remember being on the elevator with juror Briggs during the progress of the trial?

WEBB, J. What is this witness's name?

Mr. COTTER. He testified before, your honor.

WEBB, J. What is his name?

Mr. COTTER. Mr. Barry.

A. Edward P. Barry. No, sir; I was not on the elevator.

Q. You were not? Did you see juror Briggs on the elevator?

A. No, sir; not during the trial.

Q. During the trial. Well, during the trial did you see him—did you see him have a newspaper?

A. No, sir.

Q. Did he tell you that he had one during the trial?

A. No, sir; not during the trial.

Q. Did you have any talk with him in regard to a newspaper?

A. Yes, sir.

Q. You may state what it was.

Mr. HOAR. I object.

204 Q. I will ask you if you had a talk with him in regard to a newspaper that he had or read during the trial?

A. Yes, sir.

Q. Now I would like to have you state what that was.

COLT, J. You may answer.

A. In the course of my conversation with him at the Quincy House he said in going up the elevator one day he found a newspaper. He put the newspaper, I think he said, into his pocket. He was very anxious to learn what was going on in the outside world; that he remembered his oath, and that he turned that newspaper over to one of the officers. Whether or not he went into the jury room I do not know. He turned the newspaper over to one of the officers.

Q. (By WEBB, J.) Not reading it?

A. I am quite sure that he said the temptation was great, but that he did not accept of it—something to that effect.

Q. Did he say anything about seeing the paper more than once?

A. If I remember rightly, he said he knew the name of the paper.

Mr. HOAR. That is not the question; that is not responsive.

The WITNESS. He took up the paper, if I remember rightly, and I think he said, "Put it in his pocket." I think the question was put to him, "Did you read it?" He said, "The temptation was great," and he turned it over to the officer. If I remember rightly, he said he turned it over to the officer within 15 minutes, or within a very short time.

205 DANIEL W. BOND, sworn.

Q. By Mr. COTTER.) Your name is Daniel W. Bond?

A. Yes, sir.

Q. And where do you live?

A. Woburn.

Q. What is your business?

A. Leather manufacturer.

Q. Did you serve on the jury of this court for the October sitting?

A. Yes, sir.

Q. And do you know Oliver J. Briggs?

A. Yes, sir.

Q. Was he one of the jurors with you?

A. Yes, sir.

Q. You served at the trial of civil causes, did you not?

A. Yes, sir; and criminal. He did serve on the jury with me.

Q. Did you have any talk with regard to the case of Bram while you were serving on the other jury with Mr. Briggs?

A. Yes, sir.

Q. To what extent was the case discussed between you?

COLT, J. Was this prior to December 14th?

Mr. COTTER. Yes, your honor, prior to December 14th.

The WITNESS. Well, there wasn't much said. I had some talk with the juror Briggs in regard to the case.

Q. Yes. You may state what was said.

A. Well, as near as I can. I asked Mr. Briggs if he was willing to serve on a case of capital punishment; and we also had some talk in regard to the defendant, Bram, and I asked him——

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Q. You may state what was said.

A. I can't remember exactly what was said; I can tell the substance.

Q. The substance.

A. Whether the reports as they came in the paper—whether he thought the man was guilty or not. And I said I didn't see how any man could look at it otherwise from the reports in the paper, and, as I remember it, he thought as I did.

Q. Do you remember that was during the time when we had a hearing on the preliminary question, just after the indictment was returned, when there were some publications in the papers about a hearing in this court?

A. I don't remember, sir, when that was.

Q. When did you begin your service on the jury, Mr. Bond?

A. My impression is, I think the 19th of October; I will not be sure about that. I beg your pardon, it was November.

COLT, J. The term began on October 15th. I think the petit jurors were summoned in on the 1st of November.

Q. And you remained in service up to what time?

A. I don't remember; I got excused.

Q. Before the trial of this Bram case?

A. Yes, sir.

Q. Can you state more definitely, Mr. Bond, when you had this conversation which you described with Mr. Briggs?

A. No, sir; I can not. It was after I was excused.

Q. Did Mr. Briggs serve on the same jury with you?

207 A. Yes, sir.

Q. Were you foreman of that panel?

A. Yes, sir.

RINALDO A. JACK, recalled.

Q. (By Mr. COTTER.) In the presence of all the jurors and before the case was submitted to them—before the charge was delivered—did Mr. Briggs state that he made Masonic signs to the defendant and that he did not respond?

Mr. HOAR. I object.

COLT, J. Excluded.

Mr. COTTER. And note the exception, Mr. Stenographer.

Q. Did Mr. Briggs state in the presence of all the jurors, after they were empanelled and before the case was finally submitted to the jury and before the charge was made, that he, Mr. Briggs, was a Mason, and that the defendant was not, and that the defendant was a hypocrite? Did he make the statement to all the jurors?

Mr. HOAR. I object.

COLT, J. Excluded.

Mr. COTTER. And note the exception.

Q. Did he state immediately upon entering the jury, after the case had been submitted to the jury and they had retired for deliberation, in the presence of all the jurors, that he should like to be present at the execution of the defendant?

COLT, J. Excluded.

208 Mr. COTTER. And we ask that the exception be noted. Those are the questions, your honors, that I asked before in regard to those individuals, one or more.

COLT, J. Mr. Hoar——

Mr. HOAR. Is that your case?

Mr. COTTER. Yes.

Then, at defendant's request, the stenographer, WALTER ROGERS, was called.

Q. (By WEBB, J.) Did you act as stenographer during the testimony of Daniel W. Bond yesterday afternoon?

A. Yes, your honor.

Q. Will you read from your minutes of the testimony—your original stenographic minutes—beginning, if you find the place, "Well, as near as I can"——

A. Yes, your honor.

Q. "I asked Mr. Briggs if he was willing to serve on a case of capital punishment."

A. Yes, sir.

Q. "And I asked him"——

A. Then there was a break off. Then the next question was, "You may state what was said." The answer to that is, "I can't remember exactly what was said; I can tell the substance." Then the question was, "The substance?" The answer to that question is, "Whether the reports as they came in the paper—whether he thought the man was guilty or not. And I said I didn't see how any man could look at it

otherwise from the reports in the paper, and, as I remember it, he thought as I did."

209 Q. You read it exactly as it is there?

A. Precisely, your honor.

WEBB, J. Then there is no correction to be made of the answer. You may interrogate him.

Mr. COTTER. I do not care to question him; I asked permission to call him. That is not our recollection of Mr. Bond's testimony, and Mr. Bond upon being interviewed——

WEBB, J. You may recall Mr. Bond.

DANIEL W. BOND, recalled.

Q. (By Mr. COTTER.) Now, Mr. Bond, I should like to have you state as exactly as you can and as fully as you can the conversation between yourself and Mr. Briggs——

WEBB, J. No; I do not think that is correct. He ought to state the conversation as related yesterday.

Mr. COTTER. With your honor's permission, I will ask Mr. Bond to state.

Q. You may state what you said yesterday in regard to the interview with Mr. Briggs.

A. I had a conversation with——

WEBB, J. Remember, you are only to tell as you told it yesterday, not as you recollect it this morning—how you recollect your yesterday's statement.

A. I had a conversation with Mr. Briggs. I asked him if he was willing to go on a case of capital punishment. I also said I did not see how any one having read the reports in the papers could think other-

210 wise than *e*hat he was guilty; and, as I remember it, he thought as I did.

The district attorney then called ABEL C. FORD, the juror referred to in the affidavit of Sylvanus B. Coffin.

Mr. FRENCH. In order to save our rights we desire to raise a question of practice and to object to the admission of any testimony by the district attorney on the present condition of the record.

WEBB, J. You object to any testimony to meet your case?

Mr. FRENCH. No, your honor; that is not the point.

WEBB, J. What is it?

Mr. FRENCH. We object that the record raises no issue. We have a right to assume from the record that there would be no contradiction of the statements made by our affidavits. We simply desire to raise the question at this time, if your honor please. A single word in amplification of what I have already suggested. It seems to me that there is no issue joined between the defendant and the United States upon the questions of fact raised in our motion—no issue upon the record.

COLT, J. We believe the evidence to be admissible, and you may proceed, Mr. Hoar.

Mr. FRENCH. Your honor will save the exception.

COLT, J. The exception may be noted.

WEBB, J. The understand' is that it is an exception to any evidence, but not to this specific evidence.

Q. (By Mr. HOAR.) Your full name is?

A. Abel C. Ford.

211 Q. And you reside?

A. In Hyde Park.

Q. And you were one of the jurors at the trial?

A. I was.

Q. You know Sylvanus B. Coffin?

A. Slightly acquainted with him.

Q. What is his business?

A. He keeps a cigar and confectionery and paper stand there in Hyde Park.

Q. Were you in his place of business on Sunday, Jan. 10, 1897?

A. I was, in the forenoon.

Q. In the forenoon—not in the afternoon?

A. In the forenoon.

Q. Who was present there also?

A. All the ones that I recollect were Mr. Coffin and Mr. Booth.

Q. What Mr. Booth?

A. Mr. Booth, the juryman. Harry J. Booth, of Hyde Park.

Q. And he was in there on Sunday, January 10th?

A. He was.

Q. Did you at any time on that day say in the presence of Sylvanus B. Coffin, in his place of business, that you, Mr. Ford, said before the trial of the case that the defendant, Bram, ought to be hung?

Mr. FRENCH. Wait a moment, please. We renew our objection to the question.

212 COLT, J. He may answer.

Mr. FRENCH. We object and except.

A. I did not; positively I did not.

Q. Did you ever, in the presence of Mr. Coffin or to him, say that you had stated before the trial of the case of Thomas Bram that the defendant, Bram, ought to be hung, or anything like that?

A. Never.

Q. Did you ever state before the trial of the case that the defendant, Bram, ought to be hung?

A. Never.

Cross-examination:

Q. (By Mr. COTTER.) Do you know Frank Radford, of Hyde Park?

A. I do; yes, sir.

Q. Did you not state to Mr. Coffin that you had a talk with Frank Radford before the trial about this case?

A. I don't recollect that I ever did to Mr. Coffin.

Q. Are you sure you didn't?

A. I am not sure; I don't think I ever had a conversation, though, about that trial with Mr. Coffin.

Q. But did you not state that you had a conversation with Frank Radford before the trial?

A. I will say I don't recollect ever saying to Mr. Coffin anything about any such thing.

Q. Did you have a conversation with Mr. Radford about the Bram case before the trial began?

213 A. I don't recollect having a conversation with him, but one other of my shopmates.

Q. What is that?

A. Another one of my shopmates. Mr. Radford is a shopmate of mine.

Q. Mr. Radford is the superintendent, is he not?

A. No, sir.

Q. What is his connection with the shop where you work?

A. He is foreman of one of the jobs there in the shop.

Q. Who is the person you had the conversation with?

A. I couldn't tell you exactly who it was. It was one of my shopmates, but I don't know who it was. We were talking there together.

Q. How long was that before the trial?

A. Oh, it was several weeks before the trial. It was just after the indictment of Bram. It was probably the next day.

Q. Can't you give us his name?

A. I could not; no, sir.

Q. Tell us where he lives?

A. No, sir.

Q. Did you express any opinion to him?

A. I did.

Q. What was it?

A. Frank Radford might have been there at the same time. I couldn't tell you who were there.

Q. What was the opinion?

Mr. HOAR. I object.

214 COLT, J. As Judge Webb is inclined to the opinion that the evidence is admissible, it may go in, Mr. Cotter. The witness may take the stand.

Q. Do you remember the question, Mr. Ford? You were asked what the opinion was. You said you talked with somebody in the shop.

A. I can say what I said at that time?

Q. Yes.

A. When I heard—they were telling me and others there that they indicted Bram—and I said I thought they had got the right man now. That is the very words I said.

Q. And Frank Radford might have been present?

A. Yes; he might have been present; I couldn't tell you who was there. There was quite a number of us standing there talking.

Q. And did you express an opinion at any other time?

A. That is not very——

Q. Before you were called into the case, I mean?

A. At any other time?

Q. Yes.

A. Since I was called into the case?

Q. Before.

A. No, sir; I did not.

Q. Now, Mr. Ford, didn't you state to Mr. Coffin that you said to Frank Radford, before you were called into the case or empanelled as a juror, that Bram ought to be hung.

215 A. Never—positively so.

Q. But you think you did say they had the right man?

A. I didn't say it to Mr. Coffin.

Q. No, no; but to Mr. Radford.

A. I don't say I said it to Mr. Radford.

Q. But in his presence?

A. I don't say I said it in his presence. I can't recollect whether he was there or not.

Q. No. I understood you to say you thought he was there.

A. No, sir.

Q. Didn't you say you thought he was there?

A. I couldn't tell you. He might have been there.

Q. How many were present at that time?

A. I can't tell you that.

Q. And can you name anybody who was present?

A. No, sir; I cannot. I couldn't name who was there.

Q. And can you tell us the number of people who were present?

A. No, sir.

Q. Were they all shopmates of yours?

A. All shopmates; yes, sir.

Q. And what time in the day was that, Mr. Ford?

A. Oh, I should say it was in the afternoon some time.

Q. Can't you tell us something about the number of people who were present?

A. No, sir; I cannot.

216 WEBB, J. I think you have been over that sufficiently. He has already said that he cannot tell who was present and who was not.

Mr. COTTER. Very well, your honor. Did you know at that time that Frank Radford was one of the grand jurors?

A. I did.

Q. That sat in the Bram case?

A. I did.

Q. Does that at all refresh your recollection in regard to having any talk with him?

A. I don't think I ever had any talk with him about that.

Q. Do you remember one Matthew Cullen, who keeps a store on Hyde Park avenue?

A. I do.

Q. Did you not have a talk with him before you came onto the jury?

A. No, sir.

Q. Did you say in substance to anybody in Mr. Coffin's store that you said to Frank Radford, or anybody, before you were drawn on the jury, that you thought Bram ought to be hung?

A. Never; no, never.

Q. With whom did you have a conversation in Mr. Coffin's store on the 10th of this month?

A. I was talking with Harry Booth.

Q. How long were you there with him?

A. Oh, I was there perhaps five minutes.

217 Q. And did you talk about the case?

A. No, sir; I did not.
Q. Say anything about it?
A. We were talking—he said to me——
Q. Well, was there anything said about the case? That is all I asked you.
A. Nothing about the case at all; nothing about the case.

The district attorney then called OLIVER J. BRIGGS, the juror referred to in the affidavit of J. J. Connell.

Mr. COTTER. We object, if your honor please, on the grounds stated by Mr. French, which I do not think we need to repeat, but we wish to make the same objection and ask to have our rights reserved.

WEBB, J. The objection is to swearing the witness?

Mr. COTTER. No, if your honor please; to his testifying, on the grounds stated by Mr. French.

WEBB, J. You simply renew the objection to any testimony on the part of the Government?

COLT, J. Yes; the same objection that Mr. French stated.

Mr. COTTER. Yes.

Q. (By Mr. HOAR.) Mr. Briggs, your full name is Oliver?
A. Oliver J. Briggs.
Q. And you reside where?
A. In Cambridge.
Q. How long have you lived there?
218 A. Somewhere in the vicinity of 14 years.
Q. And what is your business?
A. Carpenter and builder.
Q. You were one of the jurors that sat in the Bram trial?
A. I was.
Q. Do you know James J. Connell?
A. I do.
Q. What is his business?
A. Well, he is a grocer, and I believe he is in the liquor business now on Cambridge street.
Q. Where is his place of business as a liquor dealer?
A. On Cambridge street. I couldn't tell you the number.
Q. Boston?
A. Boston.

[Here insert balance of page 34, and pages 35, 36, 37, 38, 39, 40, and 41, through "A. Harry J. Booth."]

Q. Did you on or about the fifth day of December say to James J. Connell, speaking of the defendant, Bram, substantially as follows: "There isn't the least doubt but things are looking bad for Bram, and I believe he is guilty?"
A. No, sir.
Q. Did you at any time say to James Connell substantially that?
A. Before or after the trial?
Q. Before the trial.
A. No, sir.
219 Q. Will you please describe the incident of the newspaper in the elevator?

A. Well, one night when we were going down in the elevator, I saw a paper lying on the little stool setting in the elevator, and I picked it up and put it in my pocket, and went down to the Quincy House and had supper, and after sitting there smoking a while I thought the thing over, and thought I had no right to look at it, and I got up and took it out of my pocket and gave it to Mr. McGonagle.

Q. Had you looked at it?

A. No, sir.

Q. Do you know the name of the paper?

A. I could not tell.

Cross-examination:

Q. (By Mr. COTTER.) Who was with you on the elevator when you picked up the paper?

A. The whole of the jury.

Q. One of the jurors?

A. The whole of them, I said.

Q. The whole of them? Were the officers with you?

A. They were.

Q. Mr. McGonagle and Mr. Ruhl?

A. Mr. McGonagle and Mr. Ruhl.

Q. Was there any objection made to your picking up the paper?

220 A. They didn't see me pick that paper up.

Q. What did you pick it up for?

A. It was lying there on the settee or on the chair, and I thought I would read it when I got down to the hotel.

Q. You knew at that time that it was improper for you to read a paper?

A. Just at that moment I didn't think of it.

Q. You put the paper in your pocket?

A. I did.

Q. Well, why did you pick it up and put it in your pocket without reading it, without letting the officer see you, if you thought it was all right?

A. I don't think I said that I thought it was all right.

Q. Well, then, you knew it was not all right, didn't you?

A. I said I didn't think at the time I picked it up.

Q. Well, you didn't think what, Mr. Briggs?

A. I didn't think that it was not proper for me to do it.

Q. How long did you keep that paper in your possession?

A. Till after we had supper.

Q. Meantime, did you go to your room?

A. No, sir; not out of the dining room.

Q. Not out of the dining room?

A. No, sir.

Q. You went from the court room. Did you go first to the dining room from the ——?

A. We did.

221 Q. Didn't you stop to make any change—to wash up, or anything of that kind?

A. No, sir.

WEBB, J. Where was this—at the Quincy House?

Mr. COTTER. At the Quincy House, your honor.

Q. Don't you recall, Mr. Briggs, that that was the Boston Journal?

A. I do not.

Q. Do you mean to say you didn't know?

A. I do not know.

Q. Never did?

A. Never did except from the remark of another man.

Q. Who was that man—one of the jurors?

A. Yes, sir.

Q. Did anyone call your attention to that paper, Mr. Briggs?

WEBB, J. Before he picked it up, do you mean?

Mr. COTTER. Yes, your honor.

A. Well, I saw it when I first went in the elevator, and I am quite certain one of the jurors said, "Put it in your pocket," and I did so.

Q. One of the jurors said so?

A. Yes, sir.

Q. You said you knew the paper only from some remark. Was that remark made by the juror?

A. Yes, sir.

222 Q. Did he state what the paper was?

A. He did; but I couldn't remember just what paper he said, whether it was the Advertiser or the Journal.

Q. One or the other?

A. I should say that it was one or the other; I wouldn't say exactly.

Q. Well, he stated at the time, but now you don't remember which one he said, if I understand your testimony?

A. I don't remember whether he said the Advertiser or the Journal.

Q. But he said one of them?

A. One of them; I should say he said one of them.

Q. Now, in regard to Mr. Connell. Where is his grocery store?

A. It used to be on Charles River street, but I believe the name of the street is changed—Cambridge.

Q. Charles River street?

A. Cambridge.

Q. Is that the name of the street, Charles River street?

A. I say it is changed. I don't remember what the name is now; it used to be that.

Q. The reporter asked me if you said Charles River street.

A. Yes, sir.

Q. You have known Mr. Connell for a long time, have you not?

A. A number of years.

Q. And visited his place of business?

A. I have.

223 Q. Frequently?

A. Well, not very.

Q. And did you visit there during the month of December before you were drawn on this panel—I mean in the United States *vs.* Bram?

A. I may have been in there; I can't say for sure.

Q. You might have been there about the 5th of December, might you not?

A. I wouldn't say I was not.

Q. And when you went there, did you go alone or in company with other people?
A. I generally went in company with some one else.
Q. And you frequently remained some time, did you not?
A. Not very long.
Q. Talked over matters?
A. It depends upon what matters.
Q. What say?
A. It depends on what matters you have reference to.
Q. Did you talk about any matters?
A. Nothing particular.
Q. You engaged in conversation with him, didn't you?
A. Well, yes; the people that were in there—we did all together.
Q. Your friends assembled there some?
A. Yes, sir.
Q. Which store did you visit—the one in Cambridge or the one in Boston?
224 A. The one in Boston. I have visited the one in Cambridge but not of late.
Q. Now, you had occasion to speak of your jury service, did you not, and your jury duty, when you were serving here in the circuit court, before you were called into the Bram case?
A. I think not.
Q. How positive are you, Mr. Briggs?
A. I am positive I didn't.
Q. That you did not?
A. I am positive that I didn't say any words to the effect that is set forth here.
A. No; not set forth here, but you talked about jury service and your work in court here, didn't you?
A. I said I didn't expect to be on the jury, because there was a special jury for that.
Q. You had some talk about the Bram case with Mr. Connell?
A. No, sir.
Q. Not any?
A. Not to my knowledge.
Q. Well, you said you didn't expect to be on the jury, as I understood you to say?
A. I said I understood there was to be a special jury for that.
Q. Yes; a special jury.
A. I thought so, because I was told so when I was here.
Q. And did that conversation occur while you were serving on the other jury?
225 A. I couldn't say whether it did or not.
Q. And was that about the 5th of December?
A. I couldn't say that.
Q. Mr. Connell lives at Cambridge?
A. I believe so.
Q. Do you remember meeting him on the street car some evening?
A. I have several evenings.
Q. Do you remember talking with him on the street car?

A. Well, we always pass the time of day and talk when we meet.

Q. Do you remember doing so early in December or about that time?

A. I can't say that I remember any particular time.

Q. And do you remember speaking about of your service on the jury with him when on the street car?

A. Not to my knowledge. No.

Q. You might have, might you not; you might have talked with him on the street car in regard to jury duty?

A. I might have just made a remark, but not as conversation.

Q. Well, you can't recall here when you said to Mr. Connell in regard to the Bram case, can you, in all of its details?

A. I can't recall that I ever said anything to him.

Q. Well, let us see. I understood you to say that you told him that you didn't think you would serve on the Bram case because they had a special jury.

226 A. That was all there—there was a special jury for it.

Q. Didn't you say something further than that, Mr. Briggs?

A. Not to my knowledge, sir.

Q. You might have, might you not?

A. I don't think it.

Re-direct examination:

Q. (By Mr. HOAR.) Mr. Briggs, you have said that a juror pointed out that—spoke of that paper in the elevator. What was his name?

A. Harry J. Booth.

The district attorney also called the attention of the court to the examination of the juror Abel C. Ford on his voir dire, which was as follows:

Q. (By the CLERK.) Are you related to the prisoner at the bar or to the deceased, Captain Charles I. Nash?

A. I am not.

Q. Have you any interest in this case?

A. I have not.

Q. Have you formed or expressed any opinion in relation to it?

A. I have.

Q. Are you sensible of any prejudice or bias in relation to it?

A. No, sir.

227 Q. Have you any opinion which precludes you from finding a person guilty of an offence punishable with death?

A. No, sir.

Q. (By Mr. HOAR.) You say you have formed an opinion. Is it an opinion so fixed that it could not be moved, by evidence that you heard, at all?

A. No, sir; not at all.

Q. (By Mr. COTTER.) On what was your opinion formed, Mr. Ford?

A. It was formed on reading the case.

Q. On newspaper report?

A. Yes, sir.

Q. What paper did you read?

A. The Herald.

Q. Any other?
A. That is all.
Q. How fully did you read the newspapers?
A. Partial reports.
Q. And at what period?
A. I read the first part of the case and the last part?
Q. Did you discuss the case with anyone?
A. No, sir.
Q. Have you formed any other opinion except such as you formed from the reading of the newspapers?
A. That is all.

228 Q. Is the impression made on your mind such, from the newspaper report, that you can not set aside the newspaper impressions and reports and give due weight—proper weight—to evidence?
A. No, sir.
Q. You think you can give proper weight to the evidence?
A. Yes, sir.
Q. And when you hear the evidence, decide the case on the evidence?
A. Yes, sir.

In rebuttal, the defendant called the affiant, SYLVANUS B. COFFIN:
Q. (By COLT, J.) Your full name?
A. Sylvanus B. Coffin.
Q. (By Mr. COTTER.) And you reside in Hyde Park?
A. Yes, sir.
Q. And you are in business there?
A. Yes, sir.
Q. In what business?
A. Confectionery and newspapers.
Q. Confectionery and newspapers?
A. And cigars.
Q. Do you remember seeing Mr. Ford there on Sunday, the 10th of this month?
A. Yes, sir.
Q. And at what time in the day was Mr. Ford in the store?
A. I am not quite positive; I think it was between 12 and one o'clock.

229 Q. And with whom did he engage in conversation?
A. Mr. Booth.
Q. Now, was this Bram case spoken of at that time?
Mr. HOAR. I object.
COLT, J. We hardly think that is admissible.
Mr. COTTER. Very well, your honor. We will ask that the point be saved, your honor.
COLT, J. That question is excluded, on the ground that it is not proper in rebuttal.
WEBB, J. Merely cumulative of your case in chief.
At the trial of said case on December 21, 1896, the court said:
COLT, J. As the court understand that one of the jurymen is suffering from a sick headache, and as the counsel desire to present certain questions to the court not proper for them to present in the presence of

the jury, the jury will now retire for the night and be returned at half past nine to-morrow morning.

WEBB, J. Mr. Officer, you will see that any proper medical attendance that may be needed is supplied the jury.

The foregoing was all the evidence material to the issue raised by the motion.

At the close of the hearing the defendant requested rulings, copies of which are as follows:

230 *Defendant's requests for findings.*

1. There is no sufficient evidence in the case to establish the fact that the communication described in Booth's affidavit was harmless.

2. A communication of that character is absolutely forbidden and is sufficient to invalidate the verdict.

3. The conduct of the bailiffs and other officers in charge of the jury, as described by the evidence in the hearing on motion, is such an irregular invasion of the right of a trial by jury as to absolutely vitiate the verdict.

4. The officers had no right to intermeddle with and take meals with the jury after the case had been fully submitted to the jury and before the return of the verdict.

5. It was improper and irregular for the officers in charge of the jury to permit other persons to visit or converse with the jury as described in the evidence taken at the hearing on the motion for a new trial.

6. It is vital in capital cases that the jury should pass upon and determine the case free from external causes.

7. Upon all the evidence introduced at the hearing, it is the duty of the court to set aside the verdict of the jury and to order a new trial.

231 *Defendant's additional request for findings. Re motion for new trial.*

The defendant further asks the court to find:

That the communication found in Booth's hat was possibly prejudicial and invalidates the verdict. It cannot be said that its harmlessness was apparent. The burden is upon the Government to show affirmatively that it was harmless.

Mattox *v.* U. S., 146 U. S., ad. p. 150.

Motion for a new trial was denied by the court, the court making the following rulings:

This motion sets out various reasons in its support. They will be disposed of separately, but not in the order in which they are expressed in the motion.

Before considering the specific grounds on which a new trial is asked, the court feels constrained to say a word as to the statements of counsel regarding popular feeling and expectation that a certain decision shall be pronounced in this case. We have been warned of the effect upon the respect for courts and their administration of the law if outside judgments or expectations are not satisfied. Such influences have no proper place in a court of justice. Nothing could so surely destroy confidence in judicial proceedings and decisions as a general conviction that judges

were governed and controlled by outside demands, under the stress of popular excitement, either of animosity or of sympathy, instead of
232 by a dispassionate examination of the law and the evidence. It is to be regretted that in the present case such matters have been urged upon our attention. But in a case of this kind much will be pardoned to the natural sympathy of counsel for their client and to the effect produced upon their feelings by everything in encouragement of their hopes.

Without further comment on this subject we proceed to the grounds for the motion.

First of all is the contention that some of the jurors were not qualified to sit in the cause, or, to state it differently, that some of them before being empanelled had formed and had expressed opinions in regard to the guilt or innocence of the defendant, and that one at least cherished and had expressed violent prejudice against the defendant. This charge, if supported, would require the verdict to be set aside. An impartial jury is indispensable in every trial, and especially in one involving such serious consequence as this. When a question of the proper qualification of jurors is raised, the first duty of the court is to determine it, and if it is found that the objection is sustained, a properly qualified jury should be substituted, by a new trial, if the defect has not been discovered in season to purify the panel before the commencement of the trial, by setting aside the individual and calling an impartial man in his place. In this case every juror was examined on his voir dire before being sworn to try the indictment, and counsel for the defence as well as for the prosecu-
233 tion had the privilege of further examination. In the judgment of the court at that stage of proceeding every juror sworn in the cause was properly qualified, and no challenge, either peremptory or for cause, being interposed, he was placed upon the panel. The trial occupied the court and jury continuously from December 14, 1896, to January 2, 1897, with the exception of Sundays and Christmas Day, and the jury were kept together during the whole time. It was only after the verdict had been recorded that anything was heard of the present objection.

In support of this objection evidence, both oral and by affidavit, has been produced, and, on the other hand, the jurors alleged to have been disqualified have appeared and testified before the court and have denied the accusations against them. We do not think the evidence proves any prejudgment on the part of either of the jurors accused. Without going into any recital and comparison of the evidence on one side and the other, it is enough to say that we find in it nothing to impeach the integrity of either of the jurors or to disqualify either for the duty of sitting in this cause. A motion for a new trial is addressed to the discretion of the court, and its decision is conclusive upon the question whether one of the jurors had, in fact, formed or expressed such an opinion as should disqualify him to try the case. Woodward v. Leavitt, 107 Mass., 453, 460; Clyde Mattox v. United States, 146 U. S., 140, 147, 149.

The next objection to be examined is alleged misconduct of the jury in the jury room while the trial was in progress, both before and
234 after the case had been finally committed to them. To support this objection, affidavits of one or more of the jurors have been

presented, and the foreman has been permitted to testify to some things which took place in the jury room during the final deliberation on the case.

We should not omit to say that upon this point that no evidence from others than members of the jury has been offered.

The general rule is that jurors can not be permitted to impeach the verdict to which they have assented and in which they have concurred.

In Woodward v. Leavitt, ubi supra, Judge Gray, speaking for the court (p. 460), said:

"The proper evidence of the decision of the jury is the verdict returned by them upon oath and affirmed in open court. It is essential to the freedom and independence of their deliberations that their discussions in the jury room should be kept secret and inviolable; and to admit the testimony of jurors to what took place there would create distrust, embarrassment, and uncertainty."

See also Chadbourn v. Franklin, 5 Gray, 312, 315.

But this rule does not apply to extraneous influences or acts.

The Supreme Court, in Clyde Mattox v. United States, ubi supra, said, at page 149:

"The subject was much considered by Mr. Justice Gray, then a member of the supreme judicial court of Massachusetts, in Woodward v. Leavitt, 107 Mass., 453, where numerous authorities were referred to and applied, and the conclusions announced 'that on a motion for a new trial on the ground of bias on the part of one of the jurors, the evidence of jurors as to the motives and influences which affected their deliberations is inadmissible either to impeach or to support the verdict. But a juryman may testify to any facts bearing upon the question of the existence of any extraneous influence, although not as to how far that influence operated upon his mind. So a juryman may testify in denial or explanation of acts or declarations outside of the jury room, where evidence of such
235 acts has been given as ground for a new trial.' See also Ritchie v. Holbrook, 7 S. & R., 458; Chews v. Driver, 1 Coxe (N. J.), 166; Nelms v. Mississippi, 13 Sm. & Marsh, 500; Hawkins v. New Orleans Printing Co., 29 La. Ann., 134, 140; Whitney v. Whitman, 5 Mass., 405; Hix v. Drury, 5 Pick., 296.

"We regard the rule thus laid down as conformable to right reason and sustained by the weight of authority."

Tested by these principles, we do not think the testimony admissible as to any comments one of the jurors may have made during the progress of the trial to one or more of his fellow-jurors with respect to Bram's testimony, or as to the so-called experiment of the jury in the jury room during their secret deliberation upon the verdict.

But, even if admissible, we do not think the evidence shows any irregularity on the part of the jury, though it would have been more proper for the juror to have abstained from any comments on the testimony until the case was finally submitted.

But it is further urged that the jury received improper communications from outside and were subjected to improper interference, and this, we think, should receive careful consideration.

It is said that an improper communication was secretly made on the fourth or fifth day of the trial by a Mr. Harrington, one of the bailiffs

in attendance upon the jury, to one of its members. It is well proved by the affidavit of Mr. Harry J. Booth, a juror, that the bailiff so far betrayed his trust as to approach him, Booth, and whisper to him, "Look in your hat;" that the juror so prompted did look and found slipped under the sweat band of his hat a scrap of paper on which was
236 written, "Would you like a ½ pint? If so, give me the tip Sat. morning. I will put it in your pocket. Red."

Mr. Booth testifies that he was embarrassed to know why this communication was made to him, and that he at once made it known to the foreman and to another bailiff also in charge of the jury. This action on the part of Bailiff Harrington merits the severe condemnation of the court. It was a gross violation of duty, for which there can be no excuse nor palliation. But the question is, what effect should it have to vitiate the verdict finally rendered by the jury and recorded by the court?

It is not denied that improper interference with a jury by a party, or anyone acting in his interest, or on his behalf, will vitiate a verdict. (Woodward v. Leavitt, 107 Mass., 453, 466.) In the present instance the bailiff was acting voluntarily. He in no way represented or pretended to represent the prosecution. The paper found in Booth's hat made no suggestion in regard to the case; the only condition of his proposed putting of anything in the juror's pocket, was that the juror should give a signal that he would like it.

Manifestly it only indicated a willingness on Harrington's part to supply something—presumably spirituous liquor of some kind—
237 if the juror would indicate a request for it. Furthermore, the juror did not act upon the hint, but at once exposed the bailiff. Nothing was conveyed to the juror, and we can not see how the transaction could have exercised any influence, favorable or prejudicial, on the jury, or such of them as had knowledge of the affair. The argument that because Booth in his affidavit says he was embarrassed, he was therefore embarrassed in the free action of his faculties in listening to the evidence and arguments, and in his final deliberation before reaching a verdict, appears to the court utterly insubstantial. For an irregularity like this, to set aside the verdict, would be a failure of duty on the part of the court.

We next have to consider the incident of the newspaper found in the elevator by one of the jurors, as he and his associates were passing from the court-house to their boarding place. The evidence is that he did not even notice the name of the paper, but was told it by one of his fellows who saw it as he picked it up and put it in his pocket; that he never opened or looked into it, nor passed it to any other juryman; that though sorely tempted to read, he reflected that to do so would be wrong, and he thereupon delivered it to the officer in charge of the jury, and that was the end of the whole thing. We are hardly willing to believe that counsel, after the excitement of the case has subsided, would seriously contend that for this reason this court would be justified in disturbing the verdict of the jury.

At the outset of this case it was apparent that the trial would
238 necessarily be protracted; some provision for the sustenance of the jury and for their lodging while kept together and forbidden to separate was imperative, and the marshal was directed to make provi-

sion accordingly. He was also ordered to provide whatever was necessary for the comfort and health of the jurors, including necessary medical attendance. Before the trial was concluded, one night one of the panel was so sick that he needed the treatment of a doctor; one was sent for, and was admitted to the presence of the jurors, where they were quartered, and prescribed for the sick man, and gave him directions how to care for his health. The foreman, with commendable prudence, watched the whole proceeding and words of the physician, and has testified that nothing took place other than as stated above. The due and orderly conduct of a trial does not require that a juryman shall be deprived of such medical treatment as may be requisite for his comfort, his health, and perhaps the preservation of his life. While the physician strictly confines himself to his professional duty, and in no way touches upon the duty of the jury or the business about which they are engaged, it is no error to allow him to render his professional aid, and a verdict rendered by a jury, one of whose number has been so unfortunate as to need the ministration of a doctor will not therefore be disturbed.

But it is further urged that when the jurors at a few times were taking their meals brought to the jury room for them, the bailiffs in charge, not including the Bailiff Harrington, by the way, also ate their meals
239 in the same room. The bailiffs testify that while so eating they held no conversation with any of the jurors, and there is no evidence to the contrary. There were also present waiters or servants who brought the food, and attended upon those who partook of it, passing what was called for, pouring coffee, etc. There is not the slightest suggestion of any evidence that these servants waiting on table, or either of the bailiffs there partaking of the food provided, had any talk with the jury. It would without doubt have been better, at whatever inconvenience, to provide meals for the bailiffs apart from the jurors. But these bailiffs had taken the following

"*Oath to officer.*

"You swear that you will keep this jury in some convenient place until the time to which this court shall be adjourned, and during each and every adjournment of this court pending this case, and that you will not suffer any person to speak to them, nor speak to them yourself, unless by order of court, or to ask them if they are agreed, and that you will not suffer them to disperse until you shall return them into court again, so help you God."

To comply with the obligation of this oath compelled the officers either to be constantly near the jury or to confine them in some inaccessible place. Until something more tangible than suggested suspicion of possible violation of their duty and their oaths is produced to the court, we shall not put upon the sworn officers of the court the severe censure of setting aside a verdict, on a possible conjecture that they have been guilty of conduct which would render them subject to severe punishment.

None of the above objections to the acts of bailiffs and the pres-
240 ence of servants requires or justifies setting aside this verdict.

The tone, language, manner, and unjustifiable inferences from the testimony of the final argument of the district attorney are urged as a further ground in support of the motion.

As to tone of voice, personal zeal, emphasis, and earnestness of counsel, they depend on personal traits and temperament, over which the court has no control. As to alleged unwarranted expressions, arguments, or improper deductions from the testimony employed by the district attorney, it was the duty of the counsel for the defendant to at once call the attention of the court to what was objectionable, and have it stopped. This was done only in one instance, and the objectionable argument was discontinued. But waiving the question of objection, we do not find that the district attorney used any such unwarranted expressions as would justify the court in setting aside this verdict.

Moreover the jury was carefully instructed in terms, to which no exception was taken, regarding the proper weight they should allow to arguments of counsel.

(Learned v. Hall, 133 Mass., 417; Commonwealth v. Poisson, 157 Mass., 510; Hall v. United States, 150 U. S., 76; Graves v. United States, id., 118.)

The alleged prejudice of the defendant's rights, by questions, expressions, and interruptions by one of the judges engaged in the trial, next invites attention.

This objection to the verdict is pressed with much earnestness and apparent sincerity. In every instance that the defendant's attor-
241 ney expressed to the court his dissatisfaction, the expression, or the question objected to, was withdrawn. Upon the hearing of this motion, it has been assumed that such withdrawal was prompted by a consciousness of some error, an assumption which is unwarranted. In some instances no objection to the question or the action of the court was made. If in pressing this motion it is contended that an expression of hostility to, or at least prejudice against, the defendant was manifested, a more careful examination of the record will, we believe, disabuse the minds of the counsel on this point. The questions to the medical experts which are specified were suggested by the position taken by the defence and grew out of it. The examination of his experts by the district attorney did not cover the whole ground taken by the defence, and the questions by a member of the court only supplied that omission. The remark which was addressed to counsel about the loose sheets of paper which the defendant called a duplicate of the log book, but which the evidence showed was not a duplicate, but something else, was not a misstatement of fact, but grew out of the contention of counsel as to whether the witness should be permitted to refresh his recollection as to the course the vessel was sailing, not only from the log book which was handed to him, but from memoranda subsequently made by him, which were not copies of the log book. Upon objection by defendant's counsel the court at once directed that every remark made be stricken out.

The questions which were asked during the cross-examination
242 of Sprague, an expert witness called by defendant, about the helm were proper. Only the last of these questions was objected to, when it was withdrawn and the district attorney was forbidden to repeat it.

There was an interruption by the district attorney of the argument of counsel for the defendant, where he was commenting on the examination of the witness Brown before the grand jury and the nonexamination of Bram. The argument was that there had been some "mysterious arrangement" for this proceeding on the part of the district attorney.

The court, or one member of it, remarked that the argument was "farfetched," but the argument was allowed to proceed. Strictly, the argument imputing as it did some "arrangement" on the part of the prosecution was not only farfetched, but unjustifiable. It accused the Government attorney of impropriety and abuse of his official position. The fact of calling Brown and not calling Bram before the grand jury was open to discussion and criticism in so far as it evidenced an unfavorable discrimination and prejudgment against the defendant. It did not warrant the impeachment of the officers of the United States of the wrong of contriving or combining or colluding with anyone or in any way to injure the defendant. But waiving all discussion of the reason for the expression of the judge in this and other instances, these objections proceed upon the unsound theory that a judge has no duty in the trial of causes except to keep order and hold counsel within the rules and the law. This theory would require a judge to stand by and
243 silently permit carelessness, forgetfulness, oversight, or inexperience, or superior tact, or astuteness to defeat justice and right.

It has been repeatedly held by the Supreme Court of the United States that in the national courts the judge may express to the jury his opinion in regard to the issue, provided he properly instructs them that the whole matter is one for their own determination. If he may so express an opinion upon the issue, he may manifest his opinion regarding any particular upon which the determination of the issue may in some degree depend, always on the same condition of instructing the jury of their rights and leaving to their independent action the determination of the matter. It can not be denied that in this case the jury were carefully and plainly instructed that they were not to be governed or influenced by any implied or expressed opinion of the court, but were bound to examine, weigh, and determine every point for themselves according to the free and independent and conscientious exercise of their own intelligent judgment.

In Simmons v. United States (142 U. S., 148), Mr. Justice Gray, speaking for the court, declared—

"And it is so well settled by a long series of decisions of this court that the judge presiding at a trial, civil or criminal, in any court of the United States, is authorized, whenever he thinks it will assist the jury in arriving at a just conclusion, to express to them his opinion upon the questions of fact which he submits to their determination that it is only necessary to refer to two or three recent cases in which the judge's opinion on matters of fact was quite as plainly and strongly expressed to the jury as in the case at bar. (Vicksburg, &c., Railroad v. Putnam, 118 U. S., 545; United States v. Philadelphia & Reading Railroad, 123 U. S., 113; Lovejoy v. United States, 128 U. S., 171.)"
244 See, also, B. & P. Railroad v. Fifth Baptist Church, 137 U. S., 568, 574; Doyle v. Union Pacific Railway Company, 147 U. S., 413, 430; Wilborg v. United States, 163 U. S., 632.

There remains for consideration only the general argument that the verdict is against the evidence and the weight thereof.

The authorities are very numerous which define the proper action of courts in reversing verdicts of juries as against evidence. The principle expounded by them may be summarily stated to be that when there is

evidence in the case which, if believed by the jury, would warrant their verdict it must stand, notwithstanding the fact that the court might have decided differently. There was such evidence in the present case, and in the light of the great preponderance of authority on this point the court cannot disturb the verdict given by a jury who showed themselves conspicuously patient and attentive during a long and wearisome trial. Moreover, in justice to the jurors compelled to engage in a most unpleasant and responsible duty, we are impelled to say that we do not see how any intelligent, conscientious, and painstaking jury, having listened to the whole trial and having seen the various witnesses, could have reached any different verdict.

245 We have given careful consideration to all the arguments of defendant's counsel and to the authorities cited in support of this motion.

In a protracted trial in a capital case, extending over a period of three weeks, it would probably be impossible not to discover some slight irregularity, but we do not find in this case, upon the well-settled principles governing motions of this character, any such irregularity as would justify the court in granting a new trial.

The motion for a new trial is denied.

Thereupon the defendant addressed the court as follows:

Mr. French. If your honors please, we are not aware how far we have rights to reserve exceptions to the findings of your honors with reference to this motion, but we desire to save, of course, all the right that the defendant has.

We except, if we may be permitted to, to the refusal of the court to find specifically in accordance with the requests submitted by counsel for the defendant at the close of the hearing upon the motion.

We except also, if we have a right to except, to the suggestion in the opinion to the effect that comment made by one of the jurors during the trial was not admissible—

To the finding of fact that the jurors called denied the evidence of bias—

To the findings of fact and conclusions of law as to the paper put in the juror Booth's hat by the bailiff—

246 To the finding that something more than a suspicion of wrongdoing on the part of a bailiff or stranger is necessary to set aside a verdict—

To the finding that the language of the district attorney was not improper—

To the finding that the withdrawal of the question and comment cured the objection, if any, which existed thereto—

To the finding with regard to the interruption of and comment by the court upon the final argument of the defendant's counsel.

No exceptions were formally allowed, but the matter was to be certified.

Before the foregoing motion had thus been disposed of and before judgment on the verdict the defendant filed the following motion for a new trial on the ground of newly discovered evidence, supported by affidavits, copies of which are given. At the hearing of this motion the Government introduced no evidence, but referred to evidence at the trial.

Defendant's motion for new trial on ground of newly discovered evidence.

And now comes Thomas M. Bram, the defendant in the above-entitled cause, and moves the court to set aside the verdict therein and to order a new trial, on the ground that certain new evidence has been discovered since the rendering of said verdict material to the issue involved in said indictment, the character of which evidence will more fully appear from the affidavits of Jonathan Spencer, Wallace Downey, and Hugh G. Messenger, filed herewith, and reference to which is hereby made.

By his counsel.

(Signed)

JAMES E. COTTER.
ASA P. FRENCH.

We hereby certify that the information contained in the affidavits above referred to, upon which the foregoing motion is based, was not obtained by us, and could not of necessity have been obtained by us, by the exercise of due diligence until after the rendering of the verdict in said cause.

(Signed)

JAMES E. COTTER,
ASA P. FRENCH.

After the rendering of the verdict and before judgment the said "Herbert Fuller" arrived in port at New York from South America. Thereupon the defendant had certain experiments made on said vessel in said New York, as set forth in the affidavits of Jonathan Spencer, Hugh G. Messenger, and Wallace Downey, copies of which are as follows:

248 [Caption omitted.]

Affidavit of Jonathan Spencer.

I, Jonathan Spencer, of Brooklyn, in the county of Kings and State of New York, of lawful age, on oath depose and say: That I am the Jonathan Spencer who recently testified in case of United States (Government witness) against Bram in the circuit court of the United States for the district of Massachusetts; that at the noon hour to-day I met District Attorney Hoar and Mr. James E. Cotter on board of the barkentine "Herbert Fuller," lying at the Empire Stores, so called, in said city of Brooklyn. In addition to counsel, Mr. Messenger, of Boston, Mass., certain of the present officers of the "Herbert Fuller," and other persons were present. At the request of counsel, and in the presence of all parties, I arranged and placed a bunk, which was in the after cabin or chart room, so as to correspond and be in the same position as was the cot on which Captain Nash slept on the night he was killed. At the request of counsel I hung the lantern in the forward cabin from the same hook on which it hung the night of the murder. Mr. Messenger stood at the wheel and worked the wheel with both hands in my presence and made observations through the window of the after cabin. The curtain was pushed back so as to represent its condition on the night of the murder.

My observations from the wheel into the after cabin where with the same result as testified by me in this case at the trial in Boston last December.

The counsel requested that additional observations be made after
249 dark, in the nighttime. Pursuant to an agreement reached between them, I visited the boat again at 8:30 o'clock this p. m. I met counsel, Mr. Messenger, and Mr. Wallace Downey, of Brooklyn, at the wharf, and all of us went on board of the "Herbert Fuller" together. The lights were turned out, excepting a lantern in the cabin, and I was requested to put things in the condition they were on the night of the murder, and I did so accordingly. I saw that the light in the lantern which I had hung in front of the clock in the forward cabin, where I placed it on the night of the murder, was turned down as it was on that night. I arranged the cot and other things in the after cabin so as to conform as nearly as possible to their position on the night of the murder. Mr. Messenger was requested to lie upon the floor near the cot, to represent the position of which I found Captain Nash after his death, and a white blanket was placed over him. His position, in fact, upon the floor was about the same as that occupied by Captain Nash when I first saw his remains. I then went to the wheel and stood erect on the starboard side thereof with both hands upon it and tried to look into the after cabin through the window. From that position I found it impossible to see any object whatever in the after cabin. During my observations, and in fact during the observation of the other gentlemen, a light was burning in the bin'acle as it was on the night of the murder. With one hand on the wheel and bent over, with my face close to the steps, I could see the form of a person in the after cabin, but could not be able to distinguish or identify him, on account of the rays of light being so dim. By
250 holding on the wheel with one hand and reaching over and bending with my face close to the steps I could see the lower end of the cot and Mr. Messenger's feet and his legs part way to the knees. When Mr. Messenger came to the wheel this evening, I laid on the floor near the cot where I found Captain Nash's remains, and a light-colored blanket placed over me, and I laid in that position as long as the parties desired me to. Mr. Wallace Downey was at or about the wheel during the examination on this evening. I saw him stand at the starboard side of the wheel and make observations from there.

(Signed) JONATHAN SPENCER.

The above was duly sworn to on 6th February, 1897.

[Caption omitted.]

Affidavit of Hugh G. Messenger.

I, Hugh G. Messenger, of Boston, in the Commonwealth of Massachusetts, of lawful age, on oath depose and say: That I am the Hugh G. Messenger who recently testified in the case of United States against Bram in the circuit court of the United States for the district of Massachusetts; that by request of the counsel for the defendant in said case I came to New York last evening, and pursuant to an understanding reached in my presence between United States Attorney Hoar and Mr. James E. Cotter I visited the "Herbert Fuller" at the Empire Stores, so called, in

Brooklyn, at the noon hour to-day, February 6th, when Mr. Hoar,
Mr. Cotter, Jonathan Spencer, and several other gentlemen were
251 present. I found the vessel in substantially *in* the condition as
described by me when I testified as witness in said case. In the presence of all the aforesaid parties Mr. Spencer located and placed in position a cot in the after cabin or chart room as indicating the position of the cot *of* which Captain Nash slept when he was killed. I then took my position at the wheel and made observations, with the same results as stated in the stenographic report of my evidence given at the trial as aforesaid. The steward, Mr. Spencer, made observations from the wheel in the presence of the aforesaid gentlemen. It was then agreed between the counsel present that further observations will be made in reference to the after cabin or chart room, more particularly from the wheel, for the purpose of determining how distinctly the cot, the man on the floor near the cot occupying the position in which Captain Nash's remains were found the morning after the murder, as represented and pointed out by Mr. Spencer in the presence of the aforesaid parties, at the hour of eight-thirty this p. m. After dark I accompanied Mr. Hoar and Mr. Cotter on board of the said "Herbert Fuller." We were there joined at the wharf by Mr. Spencer and Wallace Downey, of Brooklyn. All the lights in the cabin were put out with the exception of a light in a lantern, which was hung in the forward cabin from the hook in the front of the clock to represent the position of the lantern and the condition of the light on the night of the murder. I then laid on the floor near the cot and a white blanket was placed over me in the position where it was said
by Mr. Spencer that Captain Nash's remains were found after
252 his murder. While I was in this position Mr. Spencer, Mr.
Downey, and counsel were at or about the wheel. I was then ordered to come to the wheel, and Mr. Spencer took the position which had been occupied by me on the floor and the aforesaid blanket was placed over him. I then stood at the wheel, on the starboard side of said wheel, with both hands upon it, standing erect, and tried to look into the after cabin, and I found it utterly impossible to see any object in that cabin. I could not see any part of the bunk or the man on the floor of the after cabin, to wit, Mr. Spencer, or the covering over him. The light into the after cabin was very dim; indeed, I could hardly discern it—the light. With one hand on the wheel, and by reaching over so that my face came quite close to the window, I could then barely see Mr. Spencer's feet and the foot of the cot, and the light was so dim in the after cabin that it was with the greatest difficulty that I was able to discern these objects. The light was so dim that it was impossible to distinguish by me or recognize a person. I could merely observe a form with my face close to the window, and I bent over. I have carefully read the evidence of Charles Brown, on pages 723 and 724 of the stenographic report of the United States against Bram, taken December 18th, 1896. From the position therein described by Mr. Brown at the wheel it is utterly impossible for anybody to see into the after cabin.

(Signed) HUGH G. MESSENGER.

The above was duly sworn to on 6th day of February, 1897.

Affidavit of Wallace Downey.

I, Wallace Downey, of Brooklyn, N. Y., county of Kings, of lawful age, on oath depose and say that I am Wallace Downey, shipwright, of Brooklyn, N. Y. I was to-day introduced to James E. Cotter, of Boston, Mass., by Mr. F. W. Houghton, superintendent of the Maritime Association of the port of New York. Mr. Cotter thereupon requested me to meet him and U. S. District Attorney Hoar on board of the barkentine "Herbert Fuller," lying at Empire Stores in Brooklyn, at 8.30 this p. m. I met them there at the appointed time and was there introduced to Jonathan Spencer and Hugh G. Messenger; in addition to the persons named certain officials connected with the "Herbert Fuller" were on board of the vessel. I was present at the taking of the depositions of said Spencer and Messenger, and so far as their depositions relate to what occurred on their visit to the "Herbert Fuller" at 8.30 o'clock this p. m., I was present and witnessed the experiments described by both of them, and experiments were made as stated by them. I took position on the starboard side of the wheel with both hands upon it, and standing erect while working the wheel it was impossible for me to observe anything whatever in the interior of the after cabin, looking through the window in the after part of the house; by removing one hand from the wheel and leaning over toward the window with my face near the steps I could see very faintly about a foot and a half of the lower end of the cot and the feet
254 and legs of the person laying near the cot part way up to the knees. Light was so dim in the interior of the cabin that when leaving the wheel altogether and putting my face as near as possible to the window, I could see the form of a person moving inside the cabin, but not distinctly enough for recognition. While we were making certain observations the counsel and the gentlemen connected with the vessel were in the cabin. I carefully read the testimony of Charles Brown, on pages 723 and 724 of stenographic report in case of United States against Bram, given December 18th, 1896. With the same amount of light that was in the cabin to-night, as arranged by Mr. Spencer, it would be impossible for a man standing in the position described in Brown's evidence, on the pages 723 and 724, to distinguish any objects in the interior of the cabin. District Attorney Hoar called attention to the fact that I wore glasses when making observations. "I have been accustomed to wearing glasses for years. I see much more distinctly with the aid of glasses than without them. With glasses my eyesight is very good. I am 35 years of age. This affidavit in the main I personally dictated. The transcript of Brown's evidence was shown to me by Mr. Cotter, as given in the United States circuit court in Boston.

(Signed) WALLACE DOWNEY.

The above was duly sworn to on 6th day of February, 1897.

255 In addition to the aforesaid three affidavits, the defendant filed in support of said motion, affidavits of James E. Cotter and Asa

P. French, his counsel, and his own affidavit, copies of which are as follows:

[Caption omitted.]

Affidavit of James E. Cotter in support of motion for new trial on ground of newly discovered evidence.

I, James E. Cotter, of Hyde Park, in said district, of lawful age, on oath depose and say that I am of counsel of record for the defendant in the above-entitled cause; that during the trial of said cause and after the rendering of the verdict therein, I did not know and had no reason to believe that the "Herbert Fuller," the vessel named in said indictment, was in any port of the United States until I was informed on the second day of February, 1897, by a letter from the United States attorney for said district that the said "Herbert Fuller" had arrived and was then in the port of New York. Prior to the receipt of that letter I was informed and believed that said vessel was in South America.

(Signed) JAMES E. COTTER.

This was duly sworn to on the 10th February, 1897.

256 [Caption omitted.]

Affidavit of Asa P. French in support of motion for new trial on ground of newly discovered evidence.

I, Asa P. French, of Randolph, in said district, of lawful age, on oath depose and say that I am of counsel of record for the defendant in the above-entitled cause; that during the trial of said cause, and after the rendering of the verdict therein, I did not know and had no reason to believe that the "Herbert Fuller," the vessel named in said indictment, was in any port of the United States until I was informed on the —— day of February, 1897, by a letter from the United States attorney for said district that the said "Herbert Fuller" had arrived and was then in the port of New York.

ASA P. FRENCH.

The above was duly sworn to on the tenth day of February, A. D. 1897.

257 [Caption omitted.]

Affidavit of defendant in support of motion for new trial on ground of newly discovered evidence.

I, Thomas M. Bram, of lawful age, on oath depose and say that I am the defendant in the above-entitled cause; that during the trial of said cause, and after the rendering of the verdict therein, I did not know and had no reason to believe that the "Herbert Fuller," the vessel named in said indictment, was in any port of the United States until I was informed on the second day of February, 1897, through a letter received by my counsel from the United States attorney for said district, that the said "Herbert Fuller" had arrived and was then in the port of New York. Prior to the receipt of that letter, I was informed and believed that said vessel was in South America.

(Signed) THOMAS M. BRAM.

The above was duly sworn to on the tenth day of February, A. D. 1897.

258 The testimony of the said sailor Charles Brown, referred to in said affidavits of Spencer, Messenger, and Downey, was as follows:

Q. (By Mr. COTTER, of counsel for defendant.) Off part of the window, I understand you to say?

A. Yes, sir. It (a ladder) lay against the small hatch off here.

Q. Small what?

A. Hatch.

Mr. HOAR. Hatch.

Q. Hatch?

A. And went down to the last hatch.

Q. It extended up over the window, didn't it?

A. Off part of the window.

Q. It went up over the window?

A. Yes, sir.

Q. Did you do anything that night between twelve and two o'clock other than hold onto that wheel?

A. No, sir.

Q. How did you hold it?

A. I hold onto my wheel in this way [illustrating].

Q. One hand or both?

A. Both hands, sir.

Q. All the time?

A. All the time, sir; one hand on each spoke.

Q. From twelve o'clock until two?

A. Till two, sir.

259 Q. Where did you stand in reference to the center of the wheel?

A. Stand on the starboard side, sir; here, sir [pointing on the model].

Q. Are you now sure that you never took both hands or either hand off of that wheel between twelve and two o'clock?

A. I was bound to use both hands on that wheel, sir.

Q. Well, did you use them all the time?

A. I used them, sir.

Q. From twelve to two o'clock?

A. I used them, sir.

Q. Both hands?

A. Both hands. The vessel was running fast.

Q. You never took off the two hands?

A. Never, sir.

Q. Or either one of them?

A. Neither one of them, sir.

Q. Until you were relieved from the wheel?

A. Yes, sir.

Q. And do you wish to be understood as saying that, standing there before that wheel, holding on with both hands——

A. Yes, sir.

Q. That you could see and did see into that aftercabin?

A. Well, I could see over——

Q. Did you see into the aftercabin, holding with both hands?

A. Yes, sir.

260 Q. Holding the wheel with both hands?

A. Yes, sir.
Q. And standing erect, were you?
A. Yes, sir.
Q. As you are now?
A. As I am now, sir.
Q. What?
A. As I am now.
Q. As you are now?
A. Yes, sir.
Q. Very well. And working the wheel?
A. Working the wheel, sir.
Q. And while in that position these different things that you have described to this jury you saw, did you?
A. Yes, sir.
Q. Did you see any lantern?
A. No, sir.
Q. Could you see the clock from where you were?
A. No, sir.
Q. Could you see the man's face from where you were——
A. No, sir—which, beg pardon?
Q. The man on the lounge or bunk?
A. No, sir.
Q. Did you know that the captain occupied that apartment?
A. I beg pardon, sir.
Q. Did you know that the captain occupied that room or slept there?
A. No, sir.

261 Beside the testimony of Brown above given, as read to the affiants, Brown testified on his direct examination at the trial of said cause, in regard to his position at the wheel, as follows:

Q. You heard some noise first?
A. Yes; I was scared and took a jump to myself.
Q. What did you do?
A. I looked through the window on the starboard side, about 4 ft. away from me; I saw the bed was upset.
Q. What bed?
A. The bed the captain was sleeping in. I saw the man lying down on the floor.
Q. Saw the man lying down on the floor?
A. Yes, sir.
Q. How much of him could you see?
A. I could see about half his body, from his feet up.
Q. From his feet up?
A. Yes, sir.
Q. About half his body?
A. About half.
Q. Then what did you do?
A. I looked at my compass again.

* * * * * * *

A. I just looked at my compass to see. I saw somebody standing in the cabin through the window. I saw there was——
Q. You saw somebody standing there?

A. Down in the cabin in front of that window.

262 Q. Down in the cabin in front of that window; who was that?

A. The mate, Bram, sir.

Q. What did he have on?

A. A dark suit of clothes, I don't know what else, and a straw hat.

* * * * * * *

A. I saw him lift a weapon—I could not say what kind of a weapon it was—I saw the handle.

A. It looked to be on an axe; it was a long handle.

Q. What then did you see?

A. I saw a blow fall in the same direction of the captain's head.

Q. You saw a blow fall?

WEBB, J. Were there one or two hands raised?

Q. Did you see how Bram held that weapon?

A. No, sir; only saw the blow fall.

Q. Do you know whether he held it in one hand?

A. Only in his right had, sir.

Q. Only in his right hand. Then did you see him do anything more?

A. No, sir; he walked right out. So I be awfully scared and nervous.

Q. So you were awfully scared and nervous?

A. Yes, sir.

Q. And where did he walk to?

A. He walked right out from the cabin, sir; from the captain's room.

263 Q. Did you see where he went after that?

A. No, sir.

Q. When you looked through that window, how did you hold the wheel?

* * * * * * *

A. I stand so far away from the spindle [indicating].

Q. How far from the spindle did you stand?

A. About a foot, sir.

Q. Which side of it were you then?

A. Starboard side, sir.

Q. Now, when you were looking through the window, what were you holding on to?

A. To the spokes of that wheel.

* * * * * * *

Q. Did you hold on the wheel when you looked through the window?

A. Yes, sir.

Q. With how many hands

A. Both hands.

And on his cross-examination, as follows:

Q. How much light was there in that room?

A. Well, the light was like a lamp that was turned down; but there was light enough for me to see the man inside that window.

Q. Let me see if I understand you. Did you say, like a lamp would be turned down?

A. Yes, sir.

Q. I was not sure whether you said turned down or trimmed down.

264 A. Turned down.

Q. Turned down?

A. Yes, sir.

Q. You knew that the lamp was in the forward or main cabin, didn't you?

A. I not know where it was.

No other testimony was introduced at the hearing upon this motion other than that contained in said affidavits. It had appeared, however, in evidence at the trial, that on the 31st of July, 1896, the defendant and said Charles Brown were brought before F. S. Fiske, esq., United States commissioner, in Boston, on the charge of killing the persons murdered on board the "Herbert Fuller;" that the defendant was represented at that hearing by James E. Cotter, esq., who was subsequently, at the defendant's request and designation, assigned by this court as one of his counsel; that at said hearing, in the presence of the defendant, the said passenger Monks and the said sailor Loheac testified and were cross-examined at length. At said hearing it appeared that the said murders were committed shortly before two o'clock in the morning of July 14th, 1896, and that from 12 to 2 o'clock on said morning the defendant was officer of the watch, and at said time it was sailor Brown's proper station at the wheel; that at that hearing the passenger Monks testified that Brown told him (Monks) that he saw the mate kill the captain, but nothing was stated as to how or where Brown stood.

265 Said sailor Loheac testified before said commissioner that he relieved Brown at the wheel just after two o'clock on the morning of the murders, and heard a gurgle sound in the after cabin; that he heard Monks call the defendant and then saw defendant and Monks go down into the cabin; that as he stood with his hand on the wheel, he looked through the window on the starboard side of the after house and observed the light being taken from the main cabin into the passenger's room, placed on the floor in the doorway, and saw the mate and passenger in the passenger's room, where the passenger was putting on some clothing; that he saw in the chart room a heap of clothing lying on the floor; that the lantern was usually hanging under a skylight over the table in the main cabin and lighted. It was a hand lantern hanging on a hook. Said Monks also testified before said commissioner that after he awoke and called the defendant, the defendant went down in the cabin with him and took the light which hung over the table and went to Monks's room with it. It appeared that before the vessel arrived at Halifax the defendant was told that Brown said he saw the defendant kill the captain.

The "Herbert Fuller" left Halifax for Rosario in the Argentine Republic on the 15th day of August, 1896, and did not return to the United States until after the rendering of the verdict in this case.

The testimony of said Charles Brown was the only direct evidence of the killing offered by the Government at the trial.

266 Hugh G. Messenger, who made one of said affidavits, was called as a witness by the defendant in the original trial, and testified that he was a ship carpenter; that on August 5, 1896, he left Boston

for Halifax, and went on board the "Herbert Fuller," and made measurements on the 7th and 8th of that month; that he made note of his observations and measurements; that he went to Halifax for that purpose at the request of James E. Cotter, of counsel for the defendant.

He further testified on his direct examination as follows:

Q. Was your attention called particularly to the window on the starboard side of the rear part of the after house, the window leading into the chart room?

A. It was.

Q. Did you make any measurements from the wheel to that window?

A. Do you mean the chart room or the after cabin?

Q. Well, it has been called the chart room. I mean the after cabin, the starboard after room of the after cabin?

A. I did make measurements.

Q. Where the captain's remains were found?

A. Yes, sir; I did.

Q. Did you make any measurements standing at the wheel to ascertain whether there standing you could see anything in the window of the after cabin?

A. I did.

Q. With both hands on the wheel, could you see anything in that cabin?

267 A. With both hands on the wheel I could not see anything in the cabin.

Q. Then what did you do?

A. I tried the experiment with one hand on the wheel, and I could see a little light in the room.

Q. How far out did you lean? You may show.

A. I took hold of the handle of the wheel like that, and leaned forward and looked in——

Q. (By COLT, J.) In the daytime?

A. Yes, sir.

Q. (By WEBB, J.) What time in the day?

A. Two o'clock in the afternoon.

Q. How was the ship lying as to east and west?

A. The ship lay east and west, the bow pointing east and the stern west.

Cross-examination:

Q. (By Mr. HOAR, the district attorney.) What were your instructions about going down there?

A. My instructions were to go to Halifax and to see and find out what I could about this case, to make plans, to draw up the plans of the cabin, also of the house.

268 He further testified that before he arrived in Halifax the cabin had been washed and cleaned up, and that he (the witness) went particularly to make measurements of the vessel.

Jonathan Spencer, a Government witness at the trial, on cross-examination testified that he had tried at different times to look into the after cabin window while at the wheel to speak to Mrs. Nash, but could see nothing inside the cabin until he stepped up close to the window; that "you might just see the end of the work inside the cabin."

Q. What do you mean; the plastering you mean?

A. The moulding of the window.

Q. The moulding of the window?

A. Yes, sir.

Q. The moulding was the only thing you could see standing at the wheel with both hands on it?

A. Yes, sir; that is all I see.

Q. (By WEBB, J.) This, you say, was in the daytime about four o'clock?

A. Once at 4 o'clock, and once about 10 in the morning.

The second motion for a new trial came on to be heard on February 10th, 1897, the decision on the first motion for a new trial having been pronounced on the preceding day. At the hearing on this motion counsel for the defendant introduced in support of the motion said affidavits, and affidavits of the defendant and his counsel hereinbefore set forth,
269 and read the evidence of Brown hereinbefore set forth, to show the materiality of the affidavits.

There was no evidence that Brown had stated to anyone before the trial just where he was standing or what his position was when (as he testified) he saw the defendant kill Captain Nash.

While Messenger was in Halifax, the defendant and said Charles Brown were held without bail in jail in Boston charged with murder. All the crew were held there in jail as Government witnesses, being unable to give the bail required of them, except the steward Spencer, who furnished bail and was then at his home in Brooklyn, New York.

The passenger, Monks, was at his home in Brookline, Massachusetts.

It appeared at the trial that when the defendant was first taken into custody in Halifax, all the money in his possession, to wit, about twenty-eight dollars, was taken from him by the Halifax authorities and turned over to the United States officials. It was not returned to the defendant.

It appeared that every living person who was on board the "Herbert Fuller" immediately after the murders were committed, were brought to Boston with the defendant, and that none of them returned to Halifax or Nova Scotia.

On the 6th of November, 1896, on the written application of the defendant hereinafter set forth, the court assigned to him the counsel who conducted the defence, namely, James E. Cotter, esq.

270 The foregoing are all the facts material to the issues raised by said motion for a new trial.

On the 12th day of February, 1897, the court denied the motion for a new trial on the ground of newly discovered evidence, and in denying it delivered the following opinion in open court:

"COLT, J. In order to entitle a party to a new trial on the ground of newly discovered evidence, it must appear that the evidence is new; that it is not cumulative; that it is directed to the substantial proof of some question of fact in the case, and that its purpose is not merely to discredit some witnesses who testified at the trial, and that the party asking for a new trial could not, by the exercise of reasonable diligence, have produced the evidence at the trial.

"The present motion must be determined by these principles.

"In so far as the proposed evidence consists of experiments by particular persons under some alleged circumstances on board the "Herbert Fuller" while she lay in the port of New York, it is new.

"But in so far as it is evidence touching the fact in issue of the ability of one standing at a particular point on the vessel's deck to see into her cabin through a particular window, it is not new.

"On that point the defence at the trial offered evidence after the prosecution had produced evidence to the same point, and that which is now proposed is cumulative.

271 "Such evidence would be to the same matter and of the same nature, since both Spencer and Messenger testified that they had tried and could not see through that window into the cabin.

"Could the alleged new evidence have been had at the time of the trial by the exercise of reasonable diligence on the part of the defence?

"Upon this question the court entertains no doubt. It was early known that the homicide was committed during that part of the night when Bram was the officer of the watch, and when Brown was at the wheel; that Brown had stated that he saw Bram kill the captain, and consequently he must claim that he had seen into the cabin and into that portion of it where the captain was killed.

"It was also known that those events were in the night time, between midnight and 2 o'clock in the morning. Those particulars being known, the question whether Brown could have seen into the cabin and could have seen what he said he did, would at once force itself upon the mind, and was of such vital importance that it should have been promptly and thoroughly investigated. Investigation would have been easy.

"The "Herbert Fuller" remained in the port of Halifax, an accessible place, from the 5th or 6th of August, when the facts above enumerated were known to the defendant's counsel and after they had sent a special messenger to examine and measure her, until August 15th, a period of ten days.

There were persons enough in Halifax who might have been
272 called to make all possible tests into seeing into that cabin. The very Mr. Messenger who was specially sent to investigate, and who is one of the witnesses from whom new evidence on this point is proposed to be secured, was there and went on board the vessel, and did make some trial of the ability to see into the cabin, but neither he nor any other person, during all that time, made or was instructed to make any thorough examination in that regard.

"Nothing was done in New York after the ship's return from South America that could not as well have been done while she was lying in the port of Halifax, except the alleged reproduction by Spencer of the arrangement of light and furniture.

"That arrangement was not of an essential character for the determination of the particular question. Diligence would have secured before the trial all the substantial evidence now set up in support of the motion for a new trial.

"Under well settled and familiar rules of law the motion must be denied."

Whereupon the defendant excepted to the rulings, conclusions and findings of the court on questions of law as contained in said opinion as follows:

To the conclusion of law that the evidence contained in the affidavits of Spencer, Messenger, and Downey, hereinbefore referred to, was cumulative evidence.

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

To the conclusion of law that the facts show laches on the part of the defendant, or his counsel, in not being prepared with the evidence
273 of the facts contained in said affidavits at the trial.

Upon that, the court declined to allow the exceptions, but stated it would certify what the defendant claimed, that if the court erred in not allowing, the defendant might have the benefit thereof.

The assignment of Mr. Cotter as counsel for the defendant was made in compliance with the following request:

To the Honorable Justices of the Circuit Court of the United States for the District of Massachusetts:

I respectfully represent that I am accused of the crime of murder, as more fully appears by the record of said court in case United States against Bram, now pending. I am without means with which to defend myself, and respectfully request that the court assign to me as counsel James E. Cotter, esq., who at the request of myself and friends has been representing me since I was charged with the aforesaid offence in this district.

Boston, Nov. 6, 1896.
(Signed) THOMAS M. BRAM.

Subsequently Mr. French was assigned as associate counsel upon the defendant's oral reques

274 The defendant was present throughout all the proceedings in the case except where otherwise specifically noted, to wit, when Judge Aldrich made an order as to certain jurors prior to December 14th, 1896, as hereinbefore set forth.

The defendant presented his bill of exceptions, claiming to make part of the same the full stenographic report of the evidence and all proceedings at the trial, covering more than two thousand typewritten pages, and as all specified exceptions taken and allowed appear the court deemed that such a course was improper, and refused to insert that report, but at the request of the defendant's counsel orders the clerk to forward to the Supreme Court a copy of the same, in order that it may be available to the defendant if in this refusal the court erred.

And inasmuch as the several matters and things above referred to and set out do not otherwise appear of record the defendant prays that this bill of exceptions, if found correct, may be signed by the court and made part of the record in this cause.

By his attorneys:

JAMES E. COTTER.
ASA P. FRENCH.

The foregoing bill of exceptions is allowed and ordered to be entered of record in the case.

LE BARON B. COLT,
U. S. Circuit Judge.
NATHAN WEBB,
U. S. District Judge.

MARCH 4, 1897.

[Here follows diagram marked p. 274*a*.]

275 On the fourth day of March, A. D. 1897, upon motion of the attorney for the United States made in the presence of the prisoner, the court assigns March 9th current as the day for entering judgment upon the verdict, and on the same day, in the presence of the prisoner, orders that a certified copy of the evidence taken in the cause be forwarded to the clerk of the Supreme Court of the United States to accompany the transcript of record therein, but not as part thereof.

On the ninth day of March, A. D. 1897, a motion is made by the United States attorney, in the presence of the prisoner, that sentence be now imposed upon the prisoner pursuant to the verdict rendered by the jury on the second day of January, A. D. 1897, that the defendant is guilty of the murder of Charles I. Nash. Thereupon the Honorable Le Baron B. Colt, circuit judge, and the Honorable Nathan Webb, district judge, sitting together and holding the court as aforesaid, the prisoner being called and being asked if he has anything to say why the sentence of death should not be pronounced against him according to law, replies that he is innocent of the crime with which he is charged.

The court thereupon pronounces sentence as follows:

All things having been fully heard and understood by the court, it is ordered that the verdict of the jury be confirmed, and that you, Thomas M. Bram, be taken back to the place from whence you came and there remain in close confinement until Friday, the eighteenth day of
276 June, in the year of our Lord one thousand eight hundred and ninety-seven, and on that day, between the hours of eleven o'clock in the forenoon and two o'clock in the afternoon, you, the said Thomas M. Bram, be taken thence to the place of execution and that you there be hanged by the neck until you are dead.

And may God, of His infinite goodness, have mercy on your soul.

On the ninth day of March, A. D. 1896, the defendant files an affidavit that because of poverty he is unable to pay the costs of prosecuting his writ of error. The court thereupon orders that the clerk of this court prepare the transcript of record for the Supreme Court, and all necessary papers on the prosecution of his writ of error, without cost to the defendant.

A true record. Attest:

ALEX. H. TROWBRIDGE, *Clerk.*

277 *Clerk's certificate.*

UNITED STATES OF AMERICA, *District of Massachusetts, ss:*

I, Alexander H. Trowbridge, clerk of the circuit court of the United States for the district of Massachusetts, within the first circuit, certify that the foregoing is a true copy of the record in the cause entitled No. 1790, criminal docket, United States by indictment v. Thomas Bram, otherwise called Thomas C. Bram, otherwise called Thomas M. Bram, otherwise called A. Thomas Bram, in said circuit court determined, and that annexed hereto are true and attested copies of the petition for writ of error, the assignment of errors, filed in the circuit court March 9, 1897, and the original citation on writ of error with acknowledgment of service thereon, all constituting true and attested copies of the record and proceedings in said cause with all things concerning the same.

In testimony whereof I hereunto set my hand and affix the seal of said circuit court, at Boston, in said district, this twenty-fifth day of March, in the year of our Lord one thousand eight hundred and ninety-seven, and of the Independence of the United States the one hundred and twenty-first.

[SEAL.] ALEX. H. TROWBRIDGE, *Clerk.*

278 Circuit court of the United States, district of Massachusetts.

UNITED STATES BY INDICTMENT
v.
THOMAS BRAM, ALIAS. } No. 1790. Criminal docket.

Petition for writ of error. (*Filed March 9, 1897.*)

To the clerk of the circuit court of the United States for the district of Massachusetts:

Your petitioner, Thomas M. Bram, the defendant in the above entitled cause, respectfully represents that at the October term, 1896, of this court, he was convicted on indictment No. 1790, charging him with the crime of murder upon the high seas, and that said court has pronounced judgment and sentence of death upon this petitioner on the verdict of the jury convicting him as aforesaid.

Your petitioner alleges that in the record and proceedings in the trial of this cause in said court there is great and manifest error, to the prejudice and great damage of your petitioner. He, therefore, prays that a writ of error from the Supreme Court of the United States be issued by you under the seal of said court, in said cause, remanding the said cause and the record therein to the said Supreme Court, in order that
279 the same may be there reexamined and, if error be found, that the said judgment and sentence against him therein be reversed.

THOMAS M. BRAM.
By JAMES E. COTTER and
ASA P. FRENCH,
His Counsel.

A true copy. Attest:

ALEX. H. TROWBRIDGE, *Clerk.*

280 Circuit court of the United States, district of Massachusetts.

UNITED STATES BY INDICTMENT
v.
THOMAS BRAM, ALIAS. } No. 1790. Criminal docket.

Assignment of errors. (*Filed Mar. 9, 1897.*)

And now comes Thomas M. Bram, the defendant in the above entitled cause, and files this his assignment of errors committed upon the trial of said cause, and in the matter of certain motions made by the defendant both before and subsequent to said trial, to wit:

1. The court erred in overruling the defendant's plea in abatement.

2. The court erred in overruling the defendant's supplemental plea in abatement.

3. The court erred in refusing to rule that one of the grand jurors (Merrill) was not duly sworn before the grand jury considered the evidence against said defendant and returned the indictment into court.

4. The court erred in holding that two or more facts in said indictment referring to the same transactions or occurrences might properly be joined without an averment that they referred to the same transactions or occurrences.

281 5. The court erred in overruling the defendant's motion to quash.

6. The court erred in overruling the defendant's challenge to the array.

7. The court erred in holding that the defendant's objection to the apportionment of jurors was not well taken.

8. The court erred in ruling that the neglect of the constable of Cambridge, to whom was committed the venire regularly issued under the seal of this court, was no ground for challenging the array.

9. The court erred in ruling that the venires had been properly served except that which ran to Cambridge; that the challenge to the array could not be supported; and that the jurors had been legally and properly drawn, summoned, and returned, and were fit to be empanelled to try the case.

10. The court erred in ruling that the jurors mentioned in the order of Judge Aldrich were as regularly summoned and attending as those who had been summoned pursuant to the venires ordered on the seventeenth day of November.

11. The court erred in overruling the challenge for cause to the juror Solomon C. Atwood.

12. The court erred in overruling the challenge for cause to the juror Martin Best.

13. The court erred in refusing to strike out the answer of the witness Leahan, to the effect that "The door between the passenger's room and Mrs. Nash's room was locked."

14. The court erred in permitting the witness Power to testify to the conversation between him and the defendant at Halifax, while the defendant was in custody.

282 15. The court erred in not permitting the defendant to ask the witness Power on cross-examination: "What other articles, belonging to the defendant, did you take possession of at that time?"

16. The court erred in permitting the witness Anderson to answer the following question put to him, during the Government's case in chief, by the U. S. attorney: "If the vessel is on the starboard tack, and under full sail, and the sheet is eased off, and the wind coming a point or two aft on the starboard quarter, and you take your hand off the wheel, what would happen to her?"

17. The court erred in permitting the witness Loheac to answer the following question put to him by the United States attorney: "If you were steering that vessel when she was sailing in a six or seven knot breeze and she was under full sail on the starboard tack, with the sheets free and the wind coming a point or two aft on the starboard quarter,

what effect would it have on the vessel, what would the vessel do, if you took your hands off the wheel?"

18. The court erred in permitting the witness Slice to answer the following question put to him by the United States attorney: "When the 'Herbert Fuller' was sailing with sheet well off and all sails set, with the wind on the starboard quarter, about two points abaft the beam on the starboard tack, what would be the effect on that vessel if you took your hands off that wheel?"

19. The court erred in permitting the witness Perdok to answer the following question put to him by the United States attorney:
283 "When the 'Herbert Fuller' was sailing, say six or seven knots an hour, with the wind on the starboard quarter, a couple of points abaft the beam, and with the sheet of the spanker boom free, and all the sails on her set, what effect would it have on her if you took your hands off that wheel?"

20. The court erred in permitting the witness Perdok to answer the question: "Now what effect would it have on that vessel under these conditions, if you lashed that wheel?"

21. The court erred in permitting the witness Wassen to answer the following question put to him by the United States attorney: "Suppose the 'Herbert Fuller' was sailing the high seas at the rate of seven knots an hour with the wind abaft the beam on the starboard quarter, with the vessel on the starboard tack, with all sails set and the spanker sheet free, what effect would it have if you took your hands off that wheel?"

22. The court erred in permitting the witness Frank W. Draper to answer the question: "Whether in your opinion a man standing at the hip of a recumbent person, and striking blows on that person's head and forehead with an axe, would necessarily be spattered with, or covered with, some of the blood?"

23. The court erred in characterizing, during the progress of the trial, and while the defendant was on the witness stand, certain writings which the defendant called "duplicates" of the log, as follows: "He was making something to be used as evidence, a pure manufacture at that time."

24. The court erred in not permitting the defendant, for the purpose of meeting the suggestions of the Government that the defendant
284 misled Captain Nash at the time of shipment, to introduce certain letters of recommendation from the defendant's former employers, which the defendant testified he showed to Captain Nash.

25. The court erred in permitting the witness Loheac, in rebuttal, to describe the quantity and size of certain vomit which he saw upon the deck.

26. The court erred in permitting the witness Monks, in rebuttal, to testify in regard to the size and quantity of said vomit.

27. The court erred in permitting the witness Parker to testify in rebuttal how long it would take to go from Cayenne to Buenos Ayres.

28. The court erred in permitting the witness Monks to answer in rebuttal the following question: "When you and the mate Bram went down into the cabin, when you first called him, and he went down with you into the cabin, what, if anything, did he do in regard to the captain's feet?"

rebuttal the following question: "Did he (the defendant) stand at your door and peek out into the forward cabin through the chart-room door?"

30. The court erred in permitting the witness Monks to answer in rebuttal the following question: "While you (witness and defendant) were down in the cabin together, either in your room or on the way from your room to the forward cabin, did the mate Bram say anything to you; and if so, what?"

31. The court erred in permitting the witness Monks to answer in rebuttal the following question: "Did you have any conversation with Mr. Bram while you and he were on deck, immediately after your
285 discovering the murders, in regard to his having gone below between twelve and two o'clock?"

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33. The court erred in permitting the United States attorney, in his closing address to the jury, to argue upon evidence excluded by the court, and the court erred when the defendant excepted to this line of argument, in making the following comment: "The facts are before the jury, the fact of calling the witnesses."

34. The court erred in asking the witness Loheac the following question: "When the vessel was allowed to fall off, or get in the wind from any cause, would a person upon the deck know the facts?"

35. The court erred during the examination of the defendant in making the following comment: "The question is only meant to emphasize the other answer. He says he never did tell Mr. Monks, so if he never did, and Monks says he did, everyone will understand the consequences."

36. The court erred in characterizing a portion of the closing argument of the counsel for the defendant as "far fetched."

37. The court erred in not allowing the general exception of the defendant taken at the conclusion of the charge to the jury, and before the jury had retired.

286 38. The court erred in instructing the jury as follows:

"In respect to your duties I desire to read to you from one of the leading cases on the subject.

"The only mode provided by our Constitution and laws for deciding questions of fact in criminal cases is by the verdict of a jury. In a large proportion of cases, and perhaps, strictly speaking, in all cases, absolute certainty can not be attained or expected. Although the verdict to which a juror agrees must, of course, be his own verdict, the result of his own convictions, and not a mere acquiescence in the conclusion of his fellows; yet, in order to bring twelve minds to a unanimous result, you must examine the questions submitted to you with candor and with a proper regard and deference to the opinions of each other. You should consider that the case must at some time be decided, and that you are selected in the same manner and from the same source from which any future jury must be, and there is no reason to suppose that the case will ever be submitted to twelve men more intelligent, more impartial, or

more competent to decide it, or that more or clearer evidence will be produced on one side or the other. And with this view, it is your duty to decide the case, if you can conscientiously do so. But in conferring together you ought to pay proper respect to each other's opinions, and listen with a disposition to be convinced to each other's arguments. And, on the other hand, if much the larger number of your panel are for a conviction, a dissenting juror should consider whether a doubt in his own mind is a reasonable one which makes no impression upon the minds of so many men equally honest, equally intelligent with himself,
287 and who have heard the same evidence, with the same attention, with an equal desire to arrive at the truth, and under the sanction of the same oath.

"And, on the other hand, if a majority are for acquittal, the minority ought seriously to ask themselves whether they may not reasonably and ought not to doubt the correctness of a judgment which is not concurred in by most of those with whom they are associated, and distrust the weight and sufficiency of that evidence which fails to carry conviction to the minds of their fellows.

"I think, gentlemen, what I have said sufficiently answers the communication which you made to the court. You will therefore retire for further consideration of this case."

39. The court erred in not permitting the witness Jack at the hearing upon the first motion for a new trial to testify as to where Booth, one of the jurors, stated to him (the witness) that he obtained a certain paper, the presence of which in the jury room was one of the grounds alleged in said motion for a new trial.

40. The court erred in refusing to permit the defendant to ask the witness Jack the following question: "Before this case was finally submitted to the jury did the juror Briggs engage in conversation with you or in your hearing with reference to the defendant?"

41. The court erred in refusing to permit the defendant to ask the witness Bean at the hearing upon the first motion for a new trial to "state what was said by Mr. Briggs (a juror) as to his views of the case before it was fully submitted."

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43. The court erred in refusing to receive the affidavit of Edgar L. Bean, filed by the defendant in support of his first motion for a new trial.

44. The court erred in refusing to permit the defendant at the hearing upon said motion to ask the witness Barry the following question: "Did he (juror Briggs) state his views of the case, or of the defendant, afterwards, after he came on the panel—any views he formed?"

45. The court erred in not permitting the defendant at the hearing on said motion to ask the witness Whoriskey the following question: "Did he (juror Briggs) say anything in regard to his views of the case before the case was submitted to the jury?"

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(juror Briggs) state to you what his views were concerning the defendant Bram, or what he did before the case was finally submitted to the jury?"

47. The court erred in not permitting the defendant at the hearing on said motion to ask the witness Whoriskey the following question: "What did Mr. Briggs say, if anything, in regard to being present at the execution or the hanging of the defendant?"

289 48. The court erred in not permitting the defendant at the hearing upon said motion to ask the witness Jack the following question: "After the jurors left the court-room, on one of the days when the defendant was on the witness stand, did the juror Briggs engage in conversation in regard to the defendant with one or more of his fellows?"

49. The court erred in not permitting the defendant at the hearing upon said motion to ask the witness Jack the following question: "Did the juror Briggs say that he himself was a Freemason and that the defendant was not?"

50. The court erred in not permitting the defendant at the hearing upon said motion to ask the witness Jack the following question: "Did the juror Briggs state to you, or to others of the jurors, that the defendant is a hypocrite?"

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53. The court erred in refusing to permit the defendant to ask the witness Jack at the hearing upon the said motion the following question: "In the presence of all the jurors, and before the case was submitted to them, before the charge was delivered, did Mr. Briggs state that he made Masonic signs to the defendant and that he did not respond?"

290 54. The court erred in refusing to permit the defendant to ask the witness Jack, at the hearing upon said motion, the following question: "Did Mr. Briggs state in the presence of all the jurors, after they were empanneled and before the case was finally submitted to the jury, that he, Mr. Briggs, was a Mason, and that the defendant was not, and that the defendant was a hypocrite? Did he make this statement to all of the jurors?"

55. The court erred in refusing to permit the defendant to ask the witness Jack, at the hearing upon said motion, the following question: "Did he state, immediately upon entering the jury room, after the case had been submitted to the jury and they had retired for deliberation, in the presence of all the jurors, that he should like to be present at the execution of the defendant?"

56. The court erred generally in permitting the Government, at the close of the evidence introduced by the defendant in support of said motion, to introduce any testimony in reply to that introduced by the defense, and specifically in permitting the witnesses Ford and Briggs to testify.

57. The court erred in not ruling, at the close of the evidence upon said motion for a new trial, as follows:

(1) There is no sufficient evidence in the case to establish the fact that the communication described in Booth's affidavit was harmless.

(2) A communication of that character is absolutely forbidden and sufficient to invalidate the verdict.

(3) The conduct of the bailiffs and other officers in charge of
291 the jury, as described by the evidence in the hearing on motion, is such an irregular invasion of the right of a trial by jury as to absolutely vitiate the verdict.

(4) The officers had no right to intermeddle with and take meals with the jury after the case had been fully submitted to the jury and before the return of the verdict.

(5) It was improper and irregular for the officers in charge of the jury to permit other persons to visit or converse with the jury, as described in the evidence taken at the hearing on the motion for a new trial.

(6) It is vital in capital cases that the jury should pass upon and determine the case free from external causes.

(7) Upon all the evidence introduced at the hearing, it is the duty of the court to set aside the verdict of the jury and to order a new trial.

(8) That the communication found in Booth's hat was possibly prejudicial and invalidates the verdict. It cannot be said that its harmlessness was apparent. The burden is upon the Government to show affirmatively that it was harmless.

58. The court erred in ruling, in substance, that comment made by one of the jurors during the trial was not admissible in evidence under said motion.

59. The court erred in holding that the paper found in the juror Booth's hat under the circumstances testified to would not invalidate the verdict.

60. The court erred in ruling, in substance, that something more than a mere suspicion of misconduct on the part of a bailiff, or a stranger, is necessary in order to warrant the setting aside of a verdict.

292 61. The court erred in ruling that the interruption by the court of and comment upon the final argument of the defendant's counsel, where the court stated that a certain portion of said argument was "farfetched," was not a cause for granting a new trial.

62. The court erred in finding as a fact that the jurors called denied the evidence of bias.

63. The court erred in refusing to allow the defendant's exceptions taken in connection with the first motion for a new trial.

64. The court erred in ruling that the evidence contained in the affidavits of Spencer, Messenger, and Downey, filed in support of the motion for a new trial on the ground of newly-discovered evidence, was cumulative evidence.

65. The court erred, in disposing of said last-named motion, in ruling that the facts show laches on the part of the defendant or his counsel in not being prepared with the evidence of the facts contained in said affidavits at the trial.

66. The court erred in refusing to allow the exceptions taken by the defendant at the conclusion of the opinion upon the motion for a new trial upon the ground of newly discovered evidence.

67. The court erred in its conclusions of law that the second motion for a new trial "must be overruled."

THOMAS M. BRAM,
By JAMES E. COTTER,
ASA P. FRENCH,
His Counsel.

A true copy. Attest:

ALEX. H. TROWBRIDGE, *Clerk.*

293 *Citation on writ of error.*

UNITED STATES OF AMERICA, ss.

The President of the United States, to the United States of America, greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at Washington, on the * sixth day of April next, pursuant to writ of error filed in the clerk's office of the † circuit court of the United States for the district of Massachusetts, in a cause entitled United States by indictment versus Thomas Bram, otherwise called Thomas C. Bram, otherwise called Thomas M. Bram, otherwise called A. Thomas Bram, wherein the said Thomas Bram, so otherwise called as aforesaid, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Le Baron B. Colt, judge of the circuit court of the United States for the district of Massachusetts, and the Honorable Nathan Webb, district judge of the United States for the district of Maine, duly assigned to hold said circuit court, this ninth day of March, in the year of our Lord one thousand eight hundred and ninety-seven.

LE BARON B. COLT,
U. S. Circuit Judge.

NATHAN WEBB,
Dist. Judge.

294 *Acknowledgment of service on citation on writ of error.*

MARCH 9, 1897.

Due service of the within citation is hereby acknowledged.

SHERMAN HOAR,
United States Attorney for the District of Massachusetts.

295 (Indorsement on cover:) Case No. 16,541, Massachusetts, C. C. U. S. Term No. 340. Thomas Bram, otherwise called Thomas C. Bram, otherwise called Thomas M. Bram, otherwise called A. Thomas Bram, plaintiff in error, vs. The United States. Filed March 27, 1897.

* Not exceeding 30 days from the day of signing.
† Name of court to which writ of error is directed.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 340.

THOMAS BRAM, ALIAS, PLAINTIFF IN ERROR, v. THE UNITED STATES.

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1 SUBSTITUTED ASSIGNMENT OF ERRORS.

And now comes Thomas M. Bram, the defendant in the above-entitled cause, and files this, his assignment of errors committed upon the trial of said cause, and in the matter of certain motions made by the defendant both before and subsequent to said trial, as a substitute for his assignment of errors heretofore filed, to wit:

1. The court erred in overruling the defendant's plea in abatement.

2. The court erred in overruling the defendant's supplemental plea in abatement.

3. The court erred in refusing to rule that one of the grand jurors (Merrill) was not duly sworn before the grand jury considered the evidence against said defendant and returned the indictment into court.

4. The court erred in holding that two or more counts in said indictment referring to the same transactions or occurrences might properly be joined without an averment that they referred to the same transactions or occurrences.

2 5. The court erred in overruling the defendant's motion to quash.

6. The court erred in overruling the defendant's challenge to the array.

7. The court erred in holding that the defendant's objection to the apportionment of jurors was not well taken.

8. The court erred in ruling that the neglect of the constable of Cambridge, to whom was committed the venire regularly issued under the seal of this court, was no ground for challenging the array.

9. The court erred in ruling that the venires had been properly served except that which ran to Cambridge; that the challenge to the array could not be supported; and that the jurors had been legally and properly drawn, summoned, and returned, and were fit to be empanelled to try the case.

10. The court erred in ruling that the jurors mentioned in the order of Judge Aldrich were as regularly summoned and attending as those

who had been summoned pursuant to the venires ordered on the seventeenth day of November.

11. The court erred in overruling the challenge for cause to the juror Solomon C. Atwood.

12. The court erred in overruling the challenge for cause to the juror Martin Best.

13. The court erred in refusing to strike out the answer of the
3 witness Leahan, to the effect that "the door between the passenger's room and Mrs. Nash's room was locked."

14. The court erred in permitting the witness Power to testify to the conversation between him and the defendant at Halifax while the defendant was in custody, as follows: "When Mr. Bram came into my office I said to him, 'Bram, we are trying to unravel this horrible mystery.' I said 'Your position is rather an awkward one. I have had Brown in this office and he made a statement that he saw you do the murder.' He said, 'He could not have seen me; where was he?' I said, 'He states he was at the wheel.' 'Well,' he said, 'he could not see me from there.' I said, 'Now look here, Bram, I am satisfied that you killed the Captain, from all I have heard from Mr. Brown, but,' I said, 'some of us here think you could not have done all that crime alone. If you had an accomplice you should say so, and not have the blame of this horrible crime on your own shoulders.' He said, 'Well, I think, and many others on board the ship think, that Brown is the murderer, but I don't know anything about it.' He was rather short in his replies.

"Q. Anything further said by either of you?

"A. No; there was nothing further said on that occasion."

15. The court erred in not permitting the defendant to ask the witness Power, on cross-examination, "What other articles belonging to the defendant did you take possession of at that time?"

16. The court erred in permitting the witness Anderson to answer the following question put to him during the Government's case in
4 chief by the United States attorney: "If the vessel is on the starboard tack and under full sail and the sheet is eased off and the wind coming a point or two aft on the starboard quarter and you take your hand off the wheel what would happen to her?" To which question the witness answered, "The vessel would either keep off or go in the wind."

17. The court erred in permitting the witness Loheac to answer the following question put to him by the United States attorney: "If you were steering that vessel when she was sailing in a six or seven knot breeze and she was under full sail on the starboard tack, with the sheets free and the wind coming a point or two aft on the starboard quarter, what effect would it have on the vessel; what would the vessel do if you took your hands off the wheel?" To this question the witness answered as follows: "She would either fall off or come to the wind, sir."

18. The court erred in permitting the witness Slice to answer the following question put to him by the United States attorney: "When the Herbert Fuller was sailing with sheet well off and all sails set, with the wind on the starboard quarter, about two points abaft the beam on the starboard tack, what would be the effect on that vessel if you took your hands off that wheel?" To this question the witness answered as follows: "She would come up to the wind, sir."

19. The court erred in permitting the witness Perdok to answer the following question put to him by the United States attorney: "When the Herbert Fuller was sailing, say six or seven knots an hour,
5 with the wind on the starboard quarter, a couple of points abaft the beam, and with the sheet of the spanker boom free, and all the sails on her set, what effect would it have on her if you took your hands off that wheel?" To this question the witness answered as follows: "You take it off and the spanker must come over at the same time; if you took your hands off, the vessel would fall off and the spanker would want to go over to the leeward side—right over, if it stayed that way. If it was over on the port side, it would go over to starboard."

20. The court erred in permitting the witness Perdok to answer the question: "Now, what effect would it have on that vessel, under these conditions, if you lashed that wheel?" To this question the witness answered as follows: "Just the same."

21. The court erred in permitting the witness Wassen to answer the following question put to him by the United States attorney: "Suppose the Herbert Fuller was sailing the high seas at the rate of seven knots an hour, with the wind abaft the beam on the starboard quarter, with the vessel on the starboard tack, with all sails set and the spanker sheet free; what effect would it have if you took your hands off that wheel?" To this question the witness answered as follows: "She would come up to the wind or keep off."

22. The court erred in permitting the witness Frank W. Draper to answer the question, "Whether in your opinion a man standing at the hip of a recumbent person, and striking blows on that person's
6 head and forehead with an axe, would necessarily be spattered with, or covered with, some of the blood?" To this question the witness answered as follows: "My answer is, that under the conditions framed in the question, the assailant in such a case would not necessarily receive blood spots upon his person or clothing."

23. The court erred in characterizing, during the progress of the trial and while the defendant was on the witness stand, certain writings, which the defendant called "duplicates" of the log, as follows: "He was making something to be used as evidence, a pure manufacture at that time."

24. The court erred in not permitting the defendant, for the purpose of meeting the suggestions of the Government that the defendant misled Captain Nash at the time of shipment, to introduce certain letters of recommendation from the defendant's former employers, which the defendant testified he showed to Captain Nash.

25. The court erred in permitting the witness Loheac, in rebuttal, to describe the quantity and size of certain vomit which he saw upon the deck as follows: "It was about as large as the top of a spittoon."

26. The court erred in permitting the witness Monks, in rebuttal, to testify in regard to the size and quantity of said vomit as follows: "I think there was a good deal."

27. The court erred in permitting the witness Parker to testify, in rebuttal, how long it would take to go from Cayenne to Buenos Ayres, as follows: "Not less than 75 or 80 days."

7 28. The court erred in permitting the witness Monks to answer, in rebuttal, the following question: "When you and the mate Bram went down into the cabin—when you first called him, and he went

down with you into the cabin—what, if anything, did he do in regard to the Captain's feet?" To which the witness answered as follows: "He did not go anywhere near the Captain at all."

29. The court erred in permitting the witness Monks to answer, in rebuttal, the following question: "Did he (the defendant) stand at your door and peek out into the forward cabin through the chart-room door?" To this question the witness answered as follows: "No, sir; he did not."

30. The court erred in permitting the witness Monks to answer, in rebuttal, the following question: "While you (witness and defendant) were down in the cabin together, either in your room or on your way from your room to the forward companionway, did the mate Bram say anything to you, and, if so, what, about going into Mrs. Nash's room?" To this question the witness answered as follows: "He said nothing at all, sir, about it; didn't mention it."

31. The court erred in permitting the witness Monks to answer, in rebuttal, the following question: "Did you have any conversation with Mr. Bram, while you and he were on deck immediately after your discovering the murders, in regard to his having gone below between twelve and two o'clock?" To which question the witness answered: "He told me he had not been below since twelve o'clock, when he had the drink with the second mate."

32. The court erred in permitting the witness Monks to answer, in rebuttal, the following question: "Whether or not the first mate
8 (Bram) got up and walked in the direction of the second mate's room, and whether or not you called him back." To which question the witness answered: "He did not get up at all; and I did not call him back, because he did not get up."

33. The court erred in permitting the United States attorney, in his closing address to the jury, to argue upon evidence excluded by the court, and the court erred, when the defendant excepted to this line of argument, in making the following comment: "The facts are before the jury, and the fact of calling the witnesses."

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9 respect to your duties, I desire to read to you from one of the leading cases on the subject:

"'The only mode provided by our Constitution and laws for deciding questions of fact in criminal cases is by the verdict of a jury. In a large proportion of cases, and perhaps, strictly speaking, in all, absolute

certainty can not be attained or expected. Although the verdict to which a juror agrees must, of course, be his own verdict, the result of his own convictions and not a mere acquiescence in the conclusion of his fellows, yet, in order to bring twelve minds to a unanimous result you must examine the questions submitted to you with candor and with a proper regard and deference to the opinions of each other. You should consider that the case must at some time be decided, and that you are selected in the same manner and from the same source from which any future jury must be, and there is no reason to suppose that the case will ever be submitted to twelve men more intelligent, more impartial, or more competent to decide it, or that more or clearer evidence will be produced on one side or the other. And with this view, it is your duty to decide the case if you can conscientiously do so. But in conferring together you ought to pay proper respect to each other's opinions and listen with a disposition to be convinced to each other's arguments. And, on the other hand, if much the larger number of your panel are for a conviction, a dissenting juror should consider whether a doubt in his own mind is a reasonable one which makes no impression upon the minds of so many men equally honest, equally intelligent with himself, and who have heard the same evidence, with the same attention, with an equal desire to arrive at the truth, and under the sanction of the same oath.

"'And, on the other hand, if a majority are for acquittal, the minority ought seriously to ask themselves whether they may not reasonably and ought not to doubt the correctness of a judgment which is not concurred in by most of those with whom they are associated, and distrust the weight and sufficiency of that evidence which fails to carry conviction to the minds of their fellows.'

"I think, gentlemen, what I have said sufficiently answers the communication which you made to the court. You will therefore retire for further consideration of this case."

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56. The court erred generally in permitting the Government, at the close of the evidence introduced by the defendant in support of said motion, to introduce any testimony in reply to that introduced by the defense, and specifically in permitting the witnesses Ford and Briggs to testify.

57. The court erred in not ruling, at the close of the evidence upon said motion for a new trial, as follows:

(1) "There is no sufficient evidence in the case to establish the fact that the communication described in Booth's affidavit was harmless.

14 (2) A communication of that character is absolutely forbidden and sufficient to invalidate the verdict.

(3) The conduct of the bailiffs and other officers in charge of the jury, as described by the evidence in the hearing on motion, is such an irregular invasion of the right of a trial by jury as to absolutely vitiate the verdict.

(4) The officers had no right to intermeddle with and take meals with the jury after the case had been fully submitted to the jury and before the return of the verdict.

(5) It was improper and irregular for the officers in charge of the jury to permit other persons to visit or converse with the jury, as described in the evidence taken at the hearing on the motion for a new trial.

(6) It is vital in capital cases that the jury should pass upon and determine the case free from external causes.

(7) Upon all the evidence introduced at the hearing, it is the duty of the court to set aside the verdict of the jury and to order a new trial.

(8) That the communication found in Booth's hat was possibly prejudicial and invalidates the verdict. It can not be said that its harmlessness was apparent. The burden is upon the Government to show affirmatively that it was harmless.

58. The court erred in ruling, in substance, that comment made by one of the jurors during the trial was not admissible in evidence under said motion.

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64. The court erred in ruling that the evidence contained in the affidavits of Spencer, Messenger, and Downey, filed in support of the motion for a new trial on the ground of newly discovered evidence, and which tended to show in substance that under the conditions existing on the night of the murder it was impossible for one standing at the wheel, as the witness Brown said he stood, to see anything in the after-cabin, was cumulative evidence.

65. The court erred in disposing of said last named motion in ruling that the facts show laches on the part of the defendant or his
16 counsel in not being prepared with the evidence of the facts contained in said affidavits at the trial.

66. The court erred in refusing to allow the exceptions taken by the defendant at the conclusion of the opinion upon the motion for a new trial upon the ground of newly discovered evidence.

67. The court erred in its conclusions of law that the second motion for a new trial "must be overruled."

THOMAS M. BRAM.
By his attorneys,
JAMES E. COTTER.
ASA P. FRENCH.

17 (Indorsed:) Case No. 16541. Supreme Court U. S. October term, 1897. Term No. 340. Thomas Bram, alias, &c., plff. in error, vs. The United States. Substituted assignment of errors. Office Supreme Court U. S. Filed Sep. 18, 1897. James H. McKenney, clerk.

18 Supreme Court of the United States, Oct. term, 1897.

THOMAS BRAM, ALIAS, }
vs. } No. 340.
THE UNITED STATES. }

AGREEMENT.

The substituted assignment of errors filed Sept. 18th, 1897, in said case may be printed as a part of the record for the use of the court and counsel.

JAMES E. COTTER,
Attorney for Plaintiff in Error.
J. K. RICHARDS,
Solicitor-General.

19 (Indorsed on cover:) Case No. 16541. Supreme Court U. S. October term, 1897. Term No. 340. Thomas Bram, alias, &c., plff. in error, vs. The United States. Stipulation that substituted assignment of errors be printed as part of record. Office Supreme Court U. S. Filed Sep. 24, 1897. James H. McKenney, clerk.